Mr Justice Swayne

Motion to dismiss
Submitted
28 April

Oct. 1878
Oct. 9. 1878

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 766.

GEORGE A. KETCHUM, WILLIS G. CLARKE, AND THOMAS I. RILEY, PLAINTIFFS IN ERROR,

vs.

GEORGE W. BUCKLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

**FILED SEPTEMBER 11, 1878.**

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1 Transcript of the record and proceedings of a certain cause lately pending in the supreme court of Alabama on appeal from the circuit court of Mobile County, wherein Thomas J. Riley et als. were appellants, and George W. Buckley was appellee, which said record was filed in said supreme court on the 5th day of December, A. D. 1876.

Transcript of the record and proceedings had before the circuit court of Mobile County, State of Alabama, in the suit of George W. Buckley vs. Wesley W. McGuire et al., determined in said court at the spring term, 1876, thereof, and appealed to the December term, 1876, of the supreme court of the State of Alabama.

*Complaint.*

Circuit court, fall term, 1875.

THE STATE OF ALABAMA,
*Mobile County:*

GEORGE W. BUCKLEY
*vs.*
WESLEY W. McGUIRE, GEO. A. KETCHUM, Chas. T. Ketchum, W. G. Clark, John M. Brown, & Thomas J. Riley.

Circuit court, Mobile County, fall term, 1875.

2 The plaintiff claims of the defendants the sum of twenty-seven hundred and eighty-nine $\frac{87}{100}$ dollars and interest on the same from the 29th day of May, 1874, A. D., and the plaintiff avers that the defendants, with Joseph E. Smith, George Steele, J. B. Todd, J. C. Slocum, and M. D. Grinnell made and executed on the 7th day of March, A. D. 1864, their certain bond, in the probate court of Mobile County, the said W. W. McGuire as principal, and the other defendants with the other persons last above named executing said bond as sureties of the said W. W. McGuire, as the general administrator and general guardian of the county of Mobile, & which said bond was approved by George W. Bond, then judge of the probate court of Mobile County, on the 7th day of March, A. D. 1864, a copy of which said bond is here shown to the court and made part of the complaint, and is in words and figures as follows, to wit:

STATE OF ALABAMA,
*Mobile County:*

Know all men by these presents that we, Wesley W. McGuire, Joseph E. Smith, George Steele, George A. Ketchum, John B. Todd, Charles T. Ketchum, James C. Slocum, Willis G. Clark, John M. Brown, Michael D. Grinnell, and Thomas J. Riley, all of the county of Mobile,
3 are held and firmly bound unto George W. Bond, judge of the probate court in and for the county of Mobile, and his successors in office, in the sum of one hundred and fifty thousand dollars, to be paid to the said judge or his successors in office, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the seventh day of March, in the year of our Lord eighteen hundred and sixty-four.

The conditions of the above obligation are such that whereas the above bound Wesley W. McGuire has been duly reappointed general administrator and general guardian for the county of Mobile, he having been duly recommended and named for such reappointment by the court of county commissioners of said county in accordance with the provisions of an act of the legislature of the State of Alabama entitled "An act authorizing the appointment of a general administrator and general guardian for Mobile County, and for other purposes," approved December fourteenth, 1859:

Now, if the said Wesley W. McGuire shall faithfully administer all estates which may come to his charge as such general administrator and general guardian, then the above obligation to be void, otherwise to remain in full force.

| | |
|---|---|
| W. W. McGUIRE. | [L. S.] |
| JOSEPH E. SMITH. | [L. S.] |
| GEORGE STEELE. | [L. S.] |
| GEORGE A. KETCHUM. | [L. S.] |
| J. B. TODD. | [L. S.] |
| CHAS. T. KETCHUM. | [L. S.] |
| J. C. SLOCUM. | [L. S.] |
| W. G. CLARK. | [L. S.] |
| JOHN M. BROWN. | [L. S.] |
| M. D. GRINNELL. | [L. S.] |
| THOS. J. RILEY. | [L. S.] |

Taken and approved 7th day of March, A. D. 1864.

GEO. W. BOND, *Judge.*

And the said plaintiff shows to the court that he is informed that Joseph E. Smith, Geo. Steele, and J. C. Slocum are beyond the jurisdiction of this honorable court, and the said J. B. Todd and M. D. Grinnell have departed this life, and therefore those persons joining the defendants in making of the said bond are not joined in this suit.

And the said plaintiff further avers that the said W. W. McGuire was, before the execution of the bond aforesaid, reappointed, as he had theretofore been, the general administrator and general guardian of Mobile County, and the said bond was made and executed in consequence of his said reappointment as general administrator and general guardian of Mobile County, as he was required to do by the order and direction of the said probate court of Mobile County, and the same was approved as such by the said judge of the probate court as aforesaid.

And the plaintiff further avers that while the said W. W. McGuire was acting as the general administrator of the county of Mobile under said bond, the estate of Wm. W. Buckley, who departed this life in the summer or fall of 1865, came to the hands of the said W. W. McGuire, who administered on the said estate by virtue of letters of administration duly granted to him by the probate court of Mobile County on the 21st day of Sept., A. D. 1865, and by virtue of such authority and while acting as general administrator of said Mobile County, the said W. W. McGuire took possession of all and singular the goods and chattels, rights and credits, & lands and tenements that were of the estate of the said Wm. W. Buckley, dec'd, then in sight, and as such administrator reduced to his possession a large portion of the property of the estate of the said Wm. W. Buckley, dec'd, amounting to the sum of thirty thousand dollars, or other large sum, and the same yet remains in his

hands unadministered and not paid over according to law to the persons to whom it may belong.

And the plaintiff further avers that he with John T. Buckley,
6 Horace Buckley, Frank T. Buckley, and Virginia George, who are and were the heirs and distributees of the estate of Wm. W. Buckley, dec'd, cited the said W. W. McGuire to appear on the 22nd day of August, 1873, before the probate court of Mobile County, and make final settlement of his said accounts and of the estate of the said William W. Buckley, dec'd.

And in obedience to said summons and citations the said W. W. McGuire appeared before the probate court, and on or about the 27th day of May, A. D. 1874, a final decree in said cause was rendered, by which there was found to be due to the plaintiff the said sum of twenty-seven hundred & eighty-nine $\frac{87}{100}$ dollars, and a judgment and final decree was then and there rendered in favor of this plaintiff for the said sum last aforesaid, for which execution was ordered to issue against the said W. W. McGuire for the collection thereof, and on the 16th day September, A. D. 1874, an execution was issued on the said judgment against the said W. W. McGuire for the said sum specified in the said judgment, and the said execution was on the 8th day of January, 1875, returned by the sheriff of Mobile County "No property found," and so

the plaintiff says that the said W. W. McGuire, as the adminis-
7 trator of the said estate of W. W. Buckley, dec'd, has wasted and committed a devastavit of the good & chattels of the estate of the said Wm. W. Buckley, dec'd, whereby the said defendants, as sureties on the bond of the said W. W. McGuire, as general administrator of Mobile County, became liable with the said W. W. McGuire to an action as for a devastavit and waste of the assets of the said estate of Wm. W. Buckley, dec'd, and for which they bring their suit for the amount and interest above specified; and the said plaintiff avers that the said W. W. McGuire has wasted and squandered the assets of the said estate of the said Wm. W. Buckley, dec'd, and that by reason of the said waste and squandering of the estate of Wm. W. Buckley, dec'd, the bond of the said defendants has become forfeited, and they and each of them have become liable on their said bond as above set forth, and hence they bring their suit.

GIBBONS & PRICE,
*Att'ys for Pl'ff.*

*Summons.*

Circuit court, fall term, 1875.

THE STATE OF ALABAMA,
*Mobile County:*

To any sheriff of the State of Alabama:

8 You are hereby commanded to summon Wesley W. McGuire, Geo. A. Ketchum, Chas. T. Ketchum, W. G. Clark, John M. Brown, & Thomas J. Riley, to appear at the next term of the circuit court, to be held for said county, on the third Monday, November next, at the place of holding the same, then and there to answer the complaint of George W. Buckley.

Witness Frank Draxler, clerk of said court, this 3rd day o September, in the year of our Lord one thousand eight hundred and seventy-five.

Issued the 3rd day of September, 1875.

Attest:

FRANK DRAXLER, *Clerk.*

*Sheriff's return.*

Rec'd Sept. 3, 1875, and on the same day I served a copy of the within complaint and summons on Thomas J. Riley, and on the 4th day of September, 1875, I served copies of the within complaint and summons on Willis G. Clark, Wesley W. McGuire, and George A. Ketchum.

D. T. PARKER,
*Sheriff M. C.*,
By J. W. MOORE, *D. S.*

And on the 7th day of October, 1875, I served a copy of the within complaint and summons on Charles T. Ketchum, and on the 9th day of October, 1875, I served a copy of the within complaint and summons on John M. Brown.

D. T. PARKER,
*Sheriff M. C.*,
By J. W. MOORE, *D. S.*

9 *Demurrer to complaint.*

In the circuit court of Mobile County.

GEORGE W. BUCKLEY, PL'FF,
*vs.*
WESLEY W. MCGUIRE ET ALS., DEF'TS.

The said Wesley W. McGuire, one of the said defendants in the above stated case, by his attorneys, Boyles & Overall, comes and demurs in short, by consent, to the said plaintiff's said complaint, and assigns the following causes of demurrer:

1st. Because it is shown upon the face of said complaint that the probate court of Mobile County has rendered a final decree on or about the 27 of May, A. D. 1874, against said defendant in favor of said plaintiff, for the same identical sum of money claimed by plaintiff of defendant in the above stated case. That an execution was issued upon said decree and returned by the sheriff of Mobile County, to whom it was delivered by said plaintiff, and the said decree is still in full force, not reversed nor vacated.

2d. Because it is shown by plaintiff's said complaint that the probate court of Mobile County, a court of competent jurisdiction, has heretofore, to wit, about the 27th day of May, A. D. 1874, rendered a final decree for the identical sum of money which is sued for in the above entitled cause.

10 3d. Because it is shown by said plaintiff's complaint that there is a final decree of court of competent jurisdiction in favor of said plaintiff against said defendant for the same identical sum of money sued for in the above entitled cause.

4th. Because it is shown by plaintiff's said complaint that he has a final decree of a court of competent jurisdiction against said def't for the same identical sum of money sued for in the above entitled cause. That cannot have but one recovery for the same cause of action.

5th. Because the bond made by said def't, a copy of which is set out in said plaintiff's said complaint, is made payable to the judge of probate or his successor in office, and therefore this suit cannot be maintained in the name of said plaintiff.

6th. Because this suit cannot be maintained in the name of plaintiff

upon the bond, a copy of which is set out in said plaintiff's complaint, because the said bond is made payable to the judge of probate or his successors in office.

7th. Because in the above stated suit the said def't is improperly joined as a defendant.

BOYLES & OVERALL,
*Att'ys for W. W. McGuire.*

11 Filed in office Sept. 13th, 1875.

FRANK DRAXLER, *Clerk.*

Overruled one & all.

*Pleas.*

GEO. W. BUCKLEY
*vs.*
WESLEY W. MCGUIRE ET AL.

And now come the def'ts, Thomas J. Riley, George A. Ketchum, Willis G. Clark.

1. And for plea and defense to said complaint they say that said Wesley W. McGuire did well and truly administer all estates that came to his hands as general administrator of Mobile County during the term of his office for which he was appointed under the bond described in the complaint, and that at the time of issuing the letters of administration to him on the estate of Buckley, as set forth in the complaint, the said Wesley W. McGuire was not the general administrator of Mobile County, but his office had ceased and determined, and, therefore, these defendants are in no way liable for any default he may have committed in the administration of the estate of said Buckley.

12 2. And for a further plea in this behalf, they say that at the time of executing said bond described in said complaint, the State of Alabama was then one of the Confederate States and at open war with the United States, denying all its laws and jurisdiction, but governed by the laws of the Confederate States, and the laws of Alabama as one of the Confederate States; and before the first of July, 1865, the government of the Confederate States and also the government of the State of Alabama, as organized on the day of executing said bond, was conquered and subdued, and before the time specified the Government of the United States had taken entire dominion and control over the State of Alabama, and proceeded to establish civil government in said State, by reason whereof defendants says that the office of McGuire as general administrator of Mobile County was determined and ended; and that no letters of administration could issue to him afterwards as administrator general of Mobile County by virtue of his appointment in 1864, as set forth in said complaint.

They further say that Buckley did not die until September, 1865, and letters of administration were never issued to McGuire until Sep-

13 tember, 1865, long after the term of office to which he was appointed in March, 1864, had expired. Therefore they say they are in no way bound for the administration of Buckley's estate, and this they are ready to verify.

3rd. And for further plea in this behalf they say that at the time the said bond in said complaint set out was executed the sovereign power, government, and people of the State of Alabama were hostile to & at open war with the United States, denying and resisting its authority in

*Sheriff's return.*

Rec'd Sept. 3, 1875, and on the same day I served a copy of the within complaint and summons on Thomas J. Riley, and on the 4th day of September, 1875, I served copies of the within complaint and summons on Willis G. Clark, Wesley W. McGuire, and George A. Ketchum.

D. T. PARKER,
*Sheriff M. C.*,
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1st. Because it is shown upon the face of said complaint that the probate court of Mobile County has rendered a final decree on or about the 27 of May, A. D. 1874, against said defendant in favor of said plaintiff, for the same identical sum of money claimed by plaintiff of defendant in the above stated case. That an execution was issued upon said decree and returned by the sheriff of Mobile County, to whom it was delivered by said plaintiff, and the said decree is still in full force, not reversed nor vacated.

2d. Because it is shown by plaintiff's said complaint that the probate court of Mobile County, a court of competent jurisdiction, has heretofore, to wit, about the 27th day of May, A. D. 1874, rendered a final decree for the identical sum of money which is sued for in the above entitled cause.

10 3d. Because it is shown by said plaintiff's complaint that there is a final decree of court of competent jurisdiction in favor of said plaintiff against said defendant for the same identical sum of money sued for in the above entitled cause.

4th. Because it is shown by plaintiff's said complaint that he has a final decree of a court of competent jurisdiction against said def't for the same identical sum of money sued for in the above entitled cause. That cannot have but one recovery for the same cause of action.

5th. Because the bond made by said def't, a copy of which is set out in said plaintiff's said complaint, is made payable to the judge of probate or his successor in office, and therefore this suit cannot be maintained in the name of said plaintiff.

6th. Because this suit cannot be maintained in the name of plaintiff

upon the bond, a copy of which is set out in said plaintiff's complaint, because the said bond is made payable to the judge of probate or his successors in office.

7th. Because in the above stated suit the said def't is improperly joined as a defendant.

BOYLES & OVERALL,
*Att'ys for W. W. McGuire.*

11 Filed in office Sept. 13th, 1875.

FRANK DRAXLER, *Clerk.*

Overruled one & all.

*Pleas.*

GEO. W. BUCKLEY
*vs.*
WESLEY W. McGUIRE ET AL.

And now come the def'ts, Thomas J. Riley, George A. Ketchum, Willis G. Clark.

1. And for plea and defense to said complaint they say that said Wesley W. McGuire did well and truly administer all estates that came to his hands as general administrator of Mobile County during the term of his office for which he was appointed under the bond described in the complaint, and that at the time of issuing the letters of administration to him on the estate of Buckley, as set forth in the complaint, the said Wesley W. McGuire was not the general administrator of Mobile County, but his office had ceased and determined, and, therefore, these defendants are in no way liable for any default he may have committed in the administration of the estate of said Buckley.

12 2. And for a further plea in this behalf, they say that at the time of executing said bond described in said complaint, the State of Alabama was then one of the Confederate States and at open war with the United States, denying all its laws and jurisdiction, but governed by the laws of the Confederate States, and the laws of Alabama as one of the Confederate States; and before the first of July, 1865, the government of the Confederate States and also the government of the State of Alabama, as organized on the day of executing said bond, was conquered and subdued, and before the time specified the Government of the United States had taken entire dominion and control over the State of Alabama, and proceeded to establish civil government in said State, by reason whereof defendants says that the office of McGuire as general administrator of Mobile County was determined and ended; and that no letters of administration could issue to him afterwards as administrator general of Mobile County by virtue of his appointment in 1864, as set forth in said complaint.

They further say that Buckley did not die until September, 1865, and letters of administration were never issued to McGuire until Sep-

13 tember, 1865, long after the term of office to which he was appointed in March, 1864, had expired. Therefore they say they are in no way bound for the administration of Buckley's estate, and this they are ready to verify.

3rd. And for further plea in this behalf they say that at the time the said bond in said complaint set out was executed the sovereign power, government, and people of the State of Alabama were hostile to & at open war with the United States, denying and resisting its authority in

the territory of said State. That the court of county commissioners, who are alleged to have recommended said McGuire for appointment, and the court of probate of said Mobile County in which said bond is alleged to have been filed, were courts of and were presided over by officers holding under said government and State so hostile as aforesaid. That the said W. W. McGuire and the said George W. Bond, then the judge of the probate court of Mobile County, were officers of said hostile government and State, giving their allegiance thereto and to the Confederate States of America; that the said appointment of said McGuire as general administrator & general guardian of Mobile County,
14 as alleged, was to fill an office of and under said hostile government of Alabama; that thereafter, to wit, on the 29th of May, 1865, the said hostile government of Alabama and Confederate States of America were conquered and overthrown, and the people of said State forcibly deprived of civil government, and were subjected to military "rule" by the United States.

That thereafter, on, to wit, the 21st day of June, 1865, Andrew Johnston, President of the United States and Commander-in-Chief of the Army and Navy thereof, did take control of said State of Alabama, and did rule and govern the people thereof by the appointment by proclamation of one Lewis E. Parsons as governor of said State, with full and absolute power in the premises to govern and control said State and people, & to organize a government from a portion of said people for the establishing justice, restoring domestic quiet, and protecting certain persons styled loyal citizens of the United States in the enjoyment of their rights of life, liberty, and property.

That thereafter, on, to wit, the 20th day of July, 1865, the said Parsons, by virtue of his said appointment, took control of said State
15 and sought to, and did, govern and rule the people thereof, and did declare, by his proclamation published on, to wit, said 20th day of July, 1865, what laws should be in force and operation in said State, and did also appoint numerous persons to various offices therein, to hold, possess, and exercise the power of their said respective offices by virtue of said appointment, & subject to the said appointing power.

That after the office of said McGuire held by him under his alleged appointment in 1864 had by virtue of the premises determined, letters of administration were issued to him in the estate of said Buckley by one George W. Bond, who at that time claimed to be probate judge of Mobile County by virtue of an appointment to said office by said Parsons, and of his qualification thereunder pursuant to the terms of said last-mentioned proclamation. That no other or different letters of administration ever have been issued to said McGuire on the estate of said Buckley. By reason whereof they say that said McGuire did not take said letters of administration as in said complaint alleged, nor did he take possession of the property of said estate of said Buckley as general administrator of Mobile County by virtue of his alleged appoint-
16 ment on the said 7th day of March, 1864, as alleged in said complaint.

4th. And for a further plea in this behalf, they say that the government of the State of Alabama, under which said McGuire was appointed as general administrator and general guardian of Mobile County in 1864, being then hostile to and at war with the United States, was, after said appointment and the execution of said bond, and before the issuance of letters of administration to him on said Buckley's estate as alleged, conquered and overthrown, and the said State was deprived of all civil government, and was subjected to military occupation by the

Army & Government of the said United States; that on, to wit, the 21st day of June, 1865, the President and Commander-in-Chief of the Army and Navy of the United States took absolute control of the territory of said State, and did establish another and different government for the people thereof, and did appoint one Lewis E. Parsons to govern and rule said State and people. That the said Parsons, being sustained by the said President & the Army & Navy of the United States, did, by virtue of his said appointment, assume and take control of and
17 rule & govern the said State & people, and did on, to wit, the 20th day of July, 1865, organize a provisional government in said State for the alleged purpose of enabling the loyal people of Alabama to secure to themselves the benefits of civil government, and did appoint certain persons to fill various offices under him, the said Parsons, and did also appoint one Geo. W. Bond to be the probate judge of Mobile County; that said Buckley did not die till September, 1865; that the letters of administration on the estate of said Buckley as in said complaint alleged were issued to said McGuire by the said Geo. W. Bond by virtue of his appointment as judge of probate of Mobile County by said Parsons, and not otherwise. That at the time of the issuance of said letters the said government established by the said President and the said Parsons, as aforesaid, was the only government existing, and the officers appointed by them the only officers exercising any authority or domination in the State of Alabama and over the people thereof. That the office of said McGuire under his alleged appointment in 1864 had determined long before the issuance of said letters on the estate of said Buckley as alleged, by reason whereof these defendants say that
18 the said letters could not be issued to him by virtue of his said appointment as general administrator and general guardian of Mobile County.

5th. And for a further plea the def'ts ple'd in short by consent the statute of limitations of six years.

E. S. DARGAN,
*For Def'ts.*
GAYLORD B. CLARK,
*For Def'ts.*

Filed in office Nov. 15, 1875.

FRANK DRAXLER.
*Clerk.*

*Additional pleas.*

1. And for a further plea in this behalf the said defendants, securities of said McGuire, say actio non, because they say there is no such final decree in the probate court of Mobile County as is set out in the complaint, and that the decree rendered in said court is not a final decree, nor one upon which the complainant is entitled to maintain this suit against these defendants, and of this they are ready to verify, &c., and this they pray may be enquired of the court.

2. And for a further plea they say that Wesley W. McGuire was appointed administrat*ion* of Buckley's estate on the 21st Sept., 1865,
19 by the probate court of Mobile County; but on the 29th of Sept., 1865, the constitutional convention then in session at Montgomery by its ordinance vacated such grant of letters of administration, and they further aver that no assets of the estate of said Buckley between the grant

of letters of administration to said McGuire and such vacation ever came to the hands of said McGuire, & this they are ready to verify, &c.

3. And for a further plea said defendants, the securities of said McGuire, say, that after McGuire was removed from his office in 1868 by the constitutional convention aforesaid as general administrator of Mobile County, to wit, on the 19 day of February, 1869, Frederick Bromberg was duly and legally appointed administrator-general of Mobile County, and as such had the full and legal right to call said McGuire to an account and to receive from him all the assets that had come into his hands as such administrator of Buckley's estate, and more than six years had elapsed from the time said Bromberg was so appointed as such administrator before this suit was commenced against these defendants as securities, and they plead the statute of limitations of six years as a bar to the said action.

20 4. And for a further plea in this behalf said defendants aver and say that the office of general administrator & general guardian for the county of Mobile in the State of Alabama, alleged to have been held by Wesley W. McGuire, was on the 29th day of September, 1865, vacated, & he was removed from said office by an ordinance of the State convention of Alabama, then in session at Montgomery of said State, under the provisions of the proclamation of Lewis E. Parsons, provisional governor of said State, issued under authority of the President of the United States of America as the commander-in-chief of its armies; they further aver that none of the assets of the estate of said Buckley, with which said W. W. McGuire is charged in the decree rendered against him by the probate court of said county which is mentioned in the plaintiff's complaint, came to the hands of said McGuire before the date of the vacation of said office and the removal of the said McGuire therefrom as aforesaid, to wit, before the passage of said ordinance, & that none of such assets could have come to his hands, with the exercise of due diligence, before that time; but that all such assets as he was charged with in said decree came to
21 his hands after the time of such vacation & removal, and that he did not receive the same or any part thereof under and by virtue of the said official bond given by said McGuire on the 4th day of March, 1864, mentioned in the complaint.

Wherefore the defendants say that as sureties on said bond they are not liable as charged in the complaint.

E. S. DARGAN,
*Att'y for Def'ts Riley, Ketchum.*

5. And for a further plea in this behalf the said defendants say that the grant of letters of administration to McGuire as administrator of Buckley's estate on the 21st Sept., 1865, by George W. Bond, as judge of the probate court of Mobile County as alleged in the complaint, was illegal and without lawful authority, because the said George W. Bond had not been appointed judge of the probate court of Mobile County at the time said supposed letters of administration were issued by him to the said McGuire, neither by Lewis E. Parsons, then governor of the State of Alabama, nor by any other legal authority, and therefore they say they are not liable for the administration of the estate of Buckley as securities of said McGuire, and this they are ready to verify, &c.

22 E. S. DARGAN,
*Att'y for Def'ts.*

*Demurrer to pleas.*

BUCKLEY
*vs.*
W. W. MCGUIRE ET AL.

Plaintiff takes issue on the 1st of the pleas repleaded by leave of the court, to wit, the plea of nul tiel record.

And to the 2nd plea by the said defendants repleaded the pl'ff demurs, and for cause of demurrer the pl'ff says the ordinance passed by the convention of 1865, on the 29th day of Sept., 1865, had no such effect as is contended for by the defendants in their said plea, and pl'ff avers that said letters of administration granted by the probate court on the 1st day of Sept., 1865, were good and valid, and were in full force up to and after the 29th of Sept'r, 1865, as they were when they were granted on the 21st day of Sept., 1865, & therefore pl'ff prays judgment.

And to the 3rd plea repleaded, which in effect is the statute of limitations, the plaintiff demurs, because he says that the statute of limitations of six years is no answer to the complaint, & has no application to the case made by the complaint.

And to the 5th plea by the said defendants repleaded, plaintiff
23 replies as follows, to wit: That George W. Bond was elected by the people judge of the probate court of Mobile County on the 6th day of May, 1861, and gave bond and entered upon his duties as such on the 11th day of May, 1861, for the term of six years, and was in office and acting as such probate judge on the 21st day of Sept., 1865, when the said letters of administration on the estate of Buckley was granted to the said McGuire, by virtue of his said election by the people of Mobile County on the 6th day of May, 1861, and before the ordinance passed by the convention of 1865, the 29th day of Sept., 1865, and had any existence, & the plaintiff avers that the grant of letters to the said McGuire on the 21st day of Sept'r, 1865, by the said Geo. W. Bond were good and valid & made legally by the proper officer, and this the plaintiff is ready to verify.

GIBBONS & PRICE,
*Att'ys for Plaintiff.*

*Rejoinder.*

And the defendants, sued as securities of McGuire, rejoin & say that the State government of Alabama was overthrown and extinguished before the first day of July, 1865, and all officers by reason thereof
24 were vacated, & said Bond was not afterwards appointed judge of the probate court of Mobile neither by Parsons, the provisional governor, nor by any other legal authority, until July, 1866, and the letters of administration on Buckley's estate having been issued on the 21st Sept., 1865, were issued illegally & without competent authority, and these def'ts, sued as McGuire's securities, are not liable for said McGuire's acts as such administrator.

E. S. DARGAN,
*For Def'ts' Securities.*

*Demurrer to rejoinder.*

Pl'ff demurs to the defendants' rejoinder, and for cause of demurrer says:

*Trial.*

JUNE 16, 1876.

GEORGE W. BUCKLEY
*vs.*
W. W. MCGUIRE, GEO. A. KETCHUM, CHAS. T. Ketchum, W. G. Clark, John M. Brown, and Thos. J. Riley.

This day came the parties by their attorneys, and thereupon the death of John M. Brown and Chas. T. Ketchum is suggested to the court, and the suit abates as to them.

And on motion leave is granted the defendants to file additional pleas, and said additional pleas having been filed, the plaintiff takes issue on the 1st and demurs to the 2nd, 3rd, and 4th additional pleas; which demurrers being heard and considered are sustained. The plaintiff then replied to the 5th plea, to which replication the defendants rejoined and the plaintiff demurring to said rejoinder, the demurrer is sustained.

And issue being joined, thereupon came a jury of good and lawful men, to wit: Zo. S. Cook, and eleven others, who being duly em-
30 pannelled and sworn well and truly to try the issue joined herein, upon their oaths do say: "We, the jury find for the plaintiff and assess the damages at three thousand two hundred and ninety-three dollars."

It is therefore considered by the court that the plaintiff have and recover of the defendants said sum of three thousand two hundred and ninety-three dollars, the amount of the damages assessed, together with all costs in and about this behalf expended.

*Bill of exceptions.*

Mobile circuit court.

GEORGE W. BUCKLEY
*vs.*
WESLEY W. MCGUIRE, GEORGE A. KETCHUM, Thomas J. Riley, W. G. Clark.

Be it remembered that on the trial of this case the plaintiff took issue on the first plea pleaded by the def'ts, Ketchum, Riley, & Clark, securities of McGuire; but demurred to the pleas from one to five inclusive, and the court sustained the demurrer to said pleas so demurred to, and the said defendants, securities, excepted to the ruling of the court, in sustaining said demurrers.

After the ruling of the court in sustaining the demurrers to
31 each of said pleas demurred to, the said def'ts, the securities, asked leave to file additional pleas, which was granted, and they filed five additional pleas, marked on the back, additional pleas filed by leave of the court.

The plaintiff took issue on the first additional plea so filed, but demurred to the second, third, and fourth additional pleas; and the court sustained the demurrer to each of said pleas so demurred to, and the def'ts, the said securities, excepted to the ruling of the court on said demurrers.

The plaintiff then replied to the 5th additional plea, and the defendants, the said securities, rejoined and the plaintiff demurred to said

rejoinder and the court sustained the demurrer, and said defendants excepted.

The cause was then submitted to the jury on two issues, to wit, on the plea first pleaded by said def'ts (securities), and in the first of them five additional pleas pleaded by leave of the court, to support the issues against the said securities the plaintiff offered the letters of administration granted to McGuire on the 21st Sept., 1865.

To these letters the said securities objected, on the ground that they did not show that McGuire was the general administrator of Mobile
32 County at the time they were issued to him (a copy of which letters are hereto attached as Exhibit B to this bill of exceptions and made part thereof); he also offered the bond described in the complaint, which was likewise objected to, on the same ground, that neither the letters, nor bond, nor both together showed that McGuire was the general administrator of Mobile County at the time said letters were issued to said McGuire. These objections were also overruled by the court and the said defendants, securities, excepted.

The plaintiff then offered in evidence the final decree rendered in the probate court of Mobile County, a copy of which is hereto attached as an exhibit to this bill of exceptions and prayed to be taken as part thereof.

To this final decree the said def'ts, securities, objected, on the ground that it was not such a final decree as supported the allegations of the complaint, but was only a partial settlement; this objection was overruled and said securities excepted, and now on this 20 June, 1876, within less than five days after the trial and rendition of the verdict in this case, the said defendants, securities as aforesaid, presented this
33 bill of exceptions, which was signed, sealed, and allowed by the presiding judge this the 20th day of June, 1876.

HARRY T. TOULMIN,
*Judge Presiding.*

*Exhibit B to B of E.*

Probate court.

THE STATE OF ALABAMA,
*Mobile County:*

I, Gerge W. Pond, judge of said court, certify that letters of administration upon the estate of William W. Buckley, deceased, were on the twenty-first day of September, A. D. 1865, granted to Wesley W. McGuire, administrator general for said county, who duly qualified and gave bond as such, and is authorized to administer said estate.

Witness my hand and the seal of said court, at office in the city of Mobile, this twenty-first day of September, A. D. 1865.

[SEAL.] GEO. W. BOND.

[U. S. int. rev. stamp, $500.]

*Final decree to B of E.*

Probate court of said county.

STATE OF ALABAMA,
*Mobile County:*

34 W. W. Buckley, deceased, estate of.

Decree upon final account of Wesley W. McGuire, administrator.

MAY 29TH, 1876.

In this case it appears to the satisfaction of the court, that the said

Wesley W. McGuire, administrator of the estate of said William W. Buckley, deceased, was cited upon motion of the heirs at law of said decedent to appear before this court, to make a final settlement of his account on the 22nd day of August, 1873, and it appearing to the satisfaction of the court, that due and legal notice was given in the Mobile Register, a paper published and printed in the city of Mobile, for all persons having an interest in said estate, to appear and propound to same on the day above specified, and that said notice was published in the newspaper aforesaid, for three consecutive weeks anterior to the said day named for said final settlement, and it further appearing to the satisfaction of the court, on the day named for said final settlement, that the said heirs and distributees of said estate, to wit, Virginia Buckley intermarried with Lee George, and her husband Lee George,
35 over twenty-one years of age; Horace B. Buckley, over twenty-one years of age; *Horace B. Buckley, over twenty one years of age;* John S. Buckley, George W. Buckley, minor, over fourteen (14) years of age, and Frank R. Buckley, a minor, also, over fourteen years of age.

And it further appearing to the satisfaction of the court that Lee George was appointed guardian ad litem in open court in writing, and it further appearing that all the said distributees were in court by their counsel, Lyman Gibbons, esqr., and also appeared the defendant, Wesley W. McGuire, in person as well as by his counsel, William Boyles, esquire, whereupon this case was by consent of parties continued to the 2nd day of February, A. D. 1874, and on said day the said parties appeared in open court and the settlement of the account was then taken up, and the same examined by the court from day to day and from time to time by consent of the said parties in open court, until the 29th day of May, A. D. 1874, when the court rendered its decree as follows, to wit:

It appears to the satisfaction of the court that the said administrator received according to the debt side of his account, as by him first
36 filed on the 12th day of August, 1873, the sum of twenty thousand and thirty-three $\frac{89}{100}$ ($20,033.89) dollars, to which he has since added the sum of forty-six $\frac{95}{100}$ ($46.95) dollars, and by the order and judgment of this court he is also further charged as follows: For the value of a certain breast-pin, one hundred ($100) dollars; for the value of certain plated ware, one hundred and twenty-five ($125.00) dollars; for interest on balance of cash in hand at last settlement to date, being for three (3) years nine (9) months and fifteen (15) days upon sixteen thousand five hundred and forty-seven $\frac{14}{100}$ ($16,547.14, dollars; five thousand and nineteen $\frac{16}{100}$ ($5,019.16) dollars, and for interest for three years upon two thousand five hundred and twenty one $\frac{47}{100}$ ($2,521.$\frac{47}{100}$) dollars; say five hundred and forty-three $\frac{15}{100}$ ($543.15) dollars, making a total charge against him of twenty five thousand eight hundred and sixty-eight $\frac{15}{100}$ ($25,868.15) dollars, of which he has disbursed the sum of one thousand and fifty-three $\frac{95}{100}$ ($1,053.95) dollars, leaving a balance of twenty-four thousand eight hundred and fourteen $\frac{20}{100}$ ($24,814.20) dollars in his hands after allowing to him all proper credits to which he is entitled as administrator; and it also appearing
37 to the satisfaction of the court that the only heirs and distributees of said estate are the five children of said William W. Buckley, deceased, hereinbefore named, and that they are each entitled to have paid to them respectively the one fifth part of the balance found to be due to said estate, as hereinbefore stated, or the sum of *of* four thousand nine hundred and sixty-two $\frac{84}{100}$ ($4,962.84) dollars.

But it appearing to the satisfaction of the court that in the chancery

suit in Mobile County, entitled "Louisa Graham vs. Cook Baldwin et als.," a decree has been rendered in said court against the defendants for the sum of seven thousand seven hundred and six $\frac{84}{100}$ ($7,706.84) dollars, for the one-half of which said sum Wesley W. McGuire as administrator is liable, say the sum of three thousand eight hundred and fifty-three $\frac{42}{100}$ (3,854.42) dollars, and which said sum remains unpaid, and cannot be allowed as a credit to him in this settlement. Yet, in order to ascertain and determine what is due the distributees of said estate for the time being, leaving out the account of the chancery decree aforesaid, it is ordered, adjudged, and decreed that the
38 same, to wit, the sum of four thousand two hundred and fifty-one $\frac{60}{100}$ ($4,251.60) dollars, including interest made up to the date of this settlement, be deducted from the amount due by the administrator on general account, and the remainder be divided among the distributees, and decrees rendered in their favor respectively.

The above amount of five thousand two hundred and fifty-one $\frac{60}{100}$ ($4,251.60) dollars, being deducted from twenty-four thousand eight hundred and fourteen $\frac{20}{100}$ ($24,814.20) dollars, and will leave a balance of twenty thousand five hundred and sixty $\frac{60}{100}$ ($20,562.60) dollars for distribution, to be divided as follows, that is to say, into five equal parts or shares of four thousand one hundred and twelve $\frac{52}{100}$ ($4,112.52) dollars each, and it is considered by the court that the said distributees are entitled to have paid to them respectively the said sum of four thousand one hundred and twelve $\frac{52}{100}$ ($4,112.52) dollars.

But it now also further appearing that during the administration of said McGuire he has advanced to and for the said distributees certain sums from time to time for their comfortable support and maintenance, and said administrator having produced the proper vouchers in support of
39 the advances alleged to have been made, and the same having been duly examined and allowed by the court as follows, to wit: To and for Mrs. Virginia George, wife of Leonidas P. George, including cash advanced, interest upon the same to date, and the value of seventy-five ($75.00) dollars in plated ware, twelve hundred and eighty-three $\frac{48}{100}$ ($1,283.48) dollars. To and for John S. Buckley, cash and interest to date, sixteen hundred and eighty-six $\frac{41}{100}$ ($1,686.41) dollars. To and for George W. Buckley, cash and interest to date, one thousand three hundred and seventy-two $\frac{65}{100}$ ($1,372.65) dollars. To and for Frank R. Buckley, cash and interest to date, one thousand three hundred and fifty-eight $\frac{97}{100}$ ($1,358.97) dollars, and to and for Horace B. Buckley, cash and interest to date, four hundred and forty-four $\frac{80}{100}$ ($444.80) dollars, which statement of advances it now appears (excluding the amount of the liability of said administrator in the above-named chancery judgment) that the amount or share to be paid to each of said heirs and distributees should be lessened by the amounts allowed against them respectively. It is therefore ordered ad-
40 judged, and decreed that the said Virginia George and Lee P. George, her said husband, have and recover of the said Wesley W. McGuire the sum of two thousand eight hundred and twenty-nine $\frac{04}{100}$ ($2,829.04) dollars for the use of the said Virginia George, for which execution may issue.

It is further ordered, adjudged, & decreed that the said John S. Buckley have and recover of the said Wesley W. McGuire the sum of two thousand four hundred and twenty-six ($2,426.00) dollars, for which execution may issue. It is further ordered, adjudged, and decreed that the said Horace B. Buckley have and recover of the said Wesley W.

McGuire the sum of three thousand six hundred and sixty-seven $\frac{72}{100}$ ($3,667.72) dollars, for which execution may issue.

It is further ordered, adjudged, and decreed that the said George W. Buckley have and *and* recover of the said Wesley W. McGuire the sum of two thousand seven hundred and thirty-nine $\frac{87}{100}$ ($2,739.87) dollars, for which execution may issue.

It is further ordered, adjudged, and decreed that the Frank R. Buckley, minor over fourteen years of age, shall have and recover of said Wesley W. McGuire the sum of two thousand seven hundred and
41 fifty-three $\frac{53}{100}$ ($2,753.55) dollars, for which execution may issue in the name of the guardian of said minor, when appointed and duly qualified.

It is finally ordered that record be made of all papers, accounts, vouchers, and statements, relating to this settlement and proceeding upon payment of the fees due for the same.

*Appeal bond.*

STATE OF ALABAMA,
*Mobile County:*

Know all men by these presents that we, George A. Ketchum and Thomas J. Riley, as principals, and John Maguire and Wm. H. Ketchum, are held and firmly bound unto George W. Buckley, heirs, executors, or administrators, in the sum of six thousand five hundred & eighty-six dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors, or administrators, firmly by these presents. Sealed with our seals, and dated this 15th day of July, 1876.

The condition of the above obligation is such that whereas the above bound George A. Ketchum and Thomas J. Riley have this day applied for and obtained an appeal returnable to the December term, 1876, of the supreme court of Alabama, to supersede and reverse a
42 judgment recovered by the said George W. Buckley against the said George A. Ketchum, T. J. Riley et al. at the spring term, 1876, of the circuit court for Mobile County, for thirty-two hundred & ninety-three dollars besides costs:

Now, if the said George A. Ketchum and Thomas J. Riley shall prosecute to effect their said suit in the supreme court of the said State of Alabama, and shall pay and satisfy such judgment, as the supreme court shall render in the premises, then this obligation to be null and void; otherwise, to be and remain in full force and effect.

GEO. A. KETCHUM. [SEAL.]
THOS. J. RILEY. [SEAL.]
JNO. MAGUIRE. [SEAL]
WM. H. KETCHUM. [SEAL.]

Filed in office July 15th, 1876.

FRANK DRAXLER, *Clerk.*

*Citation in appeal.*

STATE OF ALABAMA,
*Mobile County:*

To the sheriff of Mobile County, greeting:

Whereas, at a term of the circuit court of Mobile, for Mobile County, held on the first Monday in March, 1876, in a certain cause in
43 said court wherein George W. Buckley was plaintiff, and George A. Ketchum el al. were defendants, a judg't was rendered against

said defendants, to reverse which the said George A. Ketchum and Thomas J. Riley have, on this day, applied for and obtained from this office an appeal, returnable to the next term of our supreme court of the State of Alabama, to be held at Montgomery on the first Tuesday of December next, and the necessary bond having been given by the said Geo. A. Ketchum and T. J. Riley with John Maguire and Wm. H. Ketchum, sureties:

Now, you are hereby commanded without delay to cite the said George W. Buckley, or Gibbons & Price, his attorneys, to appear at the next term of our said supreme court, to defend against the said appeal, if he thinks proper.

Witness Frank Draxler, clerk of the circuit court of said county, this 15th day of July, A. D. 1876.

Attest:

FRANK DRAXLER, *Clerk.*

*Sheriff's return.*

Received July 15th, 1876, and on the 18th day of July, 1876, I
44 served a copy of the within citation in appeal on L. H. Gibbons, esq., one of the firm of Gibbons & Price.

D. T. PARKER,
*Sheriff M. C.*,
By M. QUINN, *D. S.*

*Clerk's certificate.*

THE STATE OF ALABAMA,
*Mobile County:*

I, Frank Draxler, clerk of the circuit court of Mobile County, State aforesaid, do hereby certify that the foregoing pages, numbered from one to thirty-three inclusive, contain a full, true, complete, and correct transcript of the record and proceedings had in said court in the case lately pending therein between George W. Buckley, plaintiff, and Wesley W. McGuire et al., defendants, which case was determined in said court at the fall term, 1875, thereof, and appealed to the December term, 1876, of the supreme court of Alabama, as the same now appears of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this the 30 day of November, in the year of our Lord eighteen hundred and seventy-six.

[CIRCUIT COURT MOBILE COUNTY.] FRANK DRAXLER, *Clerk.*

45 Supreme court, December term, 1876.

And now comes the defendants, Riley, Ketchum, & Clark, sued as the securities of McGuire, and say there is error on the record and judgment of the court below in this cause in this:

1st. The court erred in sustaining the plaintiff's demurrer to the second, third, fourth, & 5th pleas by them, said securities, pleaded.

2nd. The court erred in sustaining the plaintiff's demurrer to the second, third, & fourth pleas by said securities, def'ts, pleaded by leave of the court as additional pleas, and also erred in sustaining each of said demurrers.

3rd. The court also erred in sustaining the plaintiff's demurrer to the def'ts' (securities') rejoinder to the 5th plea filed as an additional plea by the leave of the court.

4th. The court erred in sustaining the demurrer to the plea of such defendants the plea of the statute of limitations of six years as pleaded as one of the additional pleas.

5th. Court erred in trying the question of nul tiel record. The
46 record produced, as shown by the bill of exceptions, does not sustain the complaint, as it is not a final decree. Judgment should have been for def'ts.

6th. The court erred in sustaining each and every demurrer of the plaintiff to each and every plea demurred to, as shown by the record, and for these errors the def'ts, the securities, pray that the judgment be reversed.

E. S. DARGAN,
*For the Securities, Appellants Riley & Ketchum.*
GAYLORD B. CLARK,
*For Appellant Clark.*
R. H. R. INGE & G. L. SMITH,
*For George A. Ketchum.*

The word "rule" in 14 line and 11 page of this record is inserted by agreement of counsel.

GIBBONS & PRICE,
*For Appellee.*
E. S. DARGAN,
*For Appellants, the Securities of McGuire.*

*Additional assignments of error for appellant Clark.*

1. The court erred in admitting in evidence, against the objec-
47 tion of defendants, the letters of administration to McGuire, as shown in the bill of exceptions.

2. The court erred in admitting the bond offered in evidence against the objection of defendants, as shown in the bill of exceptions.

3. The court erred in admitting in evidence against the objection of defendants the so-called final decree rendered in the probate court as shown in the bill of exceptions.

GAYLORD B. CLARK.

*Assignment of error for W. W. McGuire.*

1. The court erred in overruling the several causes of demurrer to the complaint filed by said McGuire.

2. The court erred in rendering judgment against said W. W. McGuire.

BOYLES & OVERALL,
*Of Counsel for McGuire.*

*Filing in supreme court.*

Filed Dec. 5th, 1876.

T. J. RUTLEDGE, *Clerk.*

48 *Death of McGuire suggested.*

Supreme court, December term, 1876.

THURSDAY, *May* 31, 1877.

W. W. McGUIRE ET AL. vs. G. W. BUCKLEY. } 1 Div., 257.

In this cause the death of the appellant, Wesley W. McGuire, is suggested to the court.

*Order in supreme court.*

Supreme court.

THURSDAY, *July* 26, 1877.

W. W. MCGUIRE ET AL. vs. G. W. BUCKLEY. } 1 Div., 257.

The death of the appellant, W. W. McGuire, having been suggested on a former day of the present term, it is hereby ordered that leave be granted to revive this cause in the name of his personal representative when made known.

Manning, J., not sitting.

THE STATE OF ALABAMA:

To all to whom these present may come, greeting:

Whereas John D. Haynie applied to the probate court, holden
49 at the city of Mobile, in and for the county of Mobile, and State aforesaid, for letters of administration on the estate of Wesley W. McGuire, deceased.

And whereas the said application was granted by order of said court upon his performing the requisites required by law; and the said John D. Haynie having performed the same:

Now, therefore, be it known that the said John D. Haynie is hereby appointed the legal administrator of the goods and chattels, rights and credits, and moneys and effects which were of the said Wesley W. McGuire in his lifetime.

Witness Price Williams, jr., judge of the probate court of Mobile County, the 1st day of September, A. D. 1877.

Attest:

PRICE WILLIAMS, JR., *Judge.*

Attest:

S. G. STONE, *Clerk.*

Filed Sept. 17, 1877.

T. J. RUTLEDGE, *Clerk.*

*Scire facias to John D. Haynie.*

Supreme court of Alabama.

To any sheriff of the State of Alabama, greeting:

You are hereby commanded to execute and return the follow-
50 ing writ as the law directs:

To John D. Haynie, adm'r of W. W. McGuire, deceased:

You are hereby notified that on 26th day of July, 1877, it was ordered by said supreme court that a scire facias issue to John D. Haynie, adm'r as aforesaid, in the cause of W. W. McGuire et al. vs. Geo. W. Buckley, citing him to appear at the next term of this court, on the first Tuesday of December, 1877, and show cause, if any he can, why he should not as such administrator be made party appellant to this suit.

Witness T. J. Rutledge, clerk of said supreme court, this 26th day of Sept., 1877.

T. J. RUTLEDGE, *Clerk.*

*Sheriff's return.*

Received September 27th, 1877, and on the same day I served a copy of the within scire facias on John D. Haynie, adm'r of W. W. McGuire, deceased.

D. T. PARKER,
*Sheriff of Mobile County.*
By J. W. MOORE, *D. S.*

51 Supreme court.

WEDNESDAY, *Dec.* 5, 1877.

W. W. McGUIRE ET AL. *vs.* G. W. BUCKLEY. } 1 Div., 257.

In this cause it appearing to the court that a scire facias has been issued and served on John D. Haynie, adm'r of W. W. McGuire, deceased, requiring him to show cause why he should not be made party appellant to this cause, and said John D. Haynie as such administrator having appeared by counsel and declined to make himself a party appellant as aforesaid, it is ordered by the court that this appeal do abate as to said Wesley W. McGuire, and said cause proceed in the names of Thomas J. Riley, George A. Ketchum, and Willis G. Clark, appellants in said cause.

Supreme court.

THURSDAY, *Dec.* 6, 1877.

THOS. J. RILEY ET ALS. *vs.* GEO. W. BUCKLEY. } 1 Div., 257.

Come the parties, by attorneys, and this cause is argued and submitted for decision.

52 *Opinion of court.*

Supreme court, Dec'r term, 1877. 1st division, No. 257. Appeal from Mobile circuit court.

WESLEY W. McGUIRE'S SURETIES *vs.* GEORGE W. BUCKLEY. }

STONE, J.:

In Parks vs. Coffee (52 Al'a, 32) many of the questions raised by this record are considered and necessarily decided. In that case we approved the rulings in several of the leading decisions of the Supreme Court of the United States, and notably the case of Spratt vs. United States (20 Wall., 459). The language, which we heartily approve in the opinion in that case, defining, as it does, the legal effect of our recent civil revolution, and its overthrow, is as follows:

"The recognition of the existence and the validity of the acts of the so-called Confederate government, and that of the States which yielded a temporary support to that government, stand on very different grounds

and are governed by very different considerations. The latter, in most if not all instances, merely transferred the existing State organi-
53 zations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights, remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or false Federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only where in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion, where the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void."

We say nothing in this connection of the terms rebellion and treason, employed in the foregoing extracts. Such is the verdict which history pronounces on unsuccessful revolutions.

In Horn vs. Lockhart (17 Wall., 580), that court had said: "The
54 existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, public regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace."

Speaking of the late war, and its consequences on State officers, and the exercise by them of their accustomed functions, we, in Parks vs. Coffey, supra, said:

"Their tenure of office did not depend upon any Federal functionary. They could not be deposed, or their places supplied by the action of any one from without the State. In fine, they composed a government, created by the people of Alabama, for the enactment and enforcement of the laws of the people, were responsible for their official acts only to this people, could be succeeded in office only by those whom this people should elect, and possessed de jure all the powers of government except those which were denied to them by the constitution of Alabama and the Constitution of the United States.

"The rightful government, thus constituted, and thus endowed
55 with the powers and faculties of administration which Alabama had before, and when the act of secession was passed, continued without change, except by the regular election or appointment of successors to the persons whose terms of office expired, down to the close of the war. If any of its members ceased to be lawful members of the government while they acted as such, and became merely de facto members of it, or only actual members, they were usurpers of seats of authority which belonged to others. Who were those others that were thus expelled or kept out? Who claimed to be so? Who, if the incumbents had vacated their offices, would have had the right, or claimed that they had the right, to take and occupy them? These are questions which cannot be answered; and why not? Because the incumbents of those offices were not usurpers of them, but rightfully in possession."

This was our condition up to the moment of the surrend'r of the Confederate forces.

In the appointment of a general administrator and guardian for Mo-

bile County, in committing to his care the administration of estates of decedents, and in providing for the safe custody of infants and their estates, the court exercised functions among the most conservative
56 that are known to civil jurisprudence. These functions cannot be tortured into aid and comfort to the war which this with other States were engaged in with the Government of the United States.

It is contended, however, that when the Confederate revolution was overthrown we lost our corporate existence and municipal organization, and were remitted to the common status of conquered territory. The last of these propositions may admit of serious debate. It may be that, in the language of Justice Miller, supra, we only sought to transfer our existing State organizations to the support of a new and different national head. It is difficult to understand how such attempted transfer could work a forfeiture of our corporate existence and resolve us into unorganized elements. We had never ceased to be a State, and the results of the war proved we had never ceased to be a State in the Union. But even if our defeat placed us in the category of conquered alien territory, the result contended for did not follow. Conquest does not ipso facto supplant civil administration. It only arms the victor with the power to displace the precedent authority and to impose one of its own. It may tolerate and continue existing order; it may modify it; it may
57 impose an entirely new system. Might makes right, but victory gives only a power to change; it does not change, proprio vigore. When the United States take possession of any rebel district they acquire no new title, but merely vindicate that which previously existed, and are to do only what is necessary for that purpose. (Case of Amy Warrick, Law Rep., June, 1862. See also Cross vs. Harrison, 16 How., 164.)

Conquest of a foreign territory absolves political allegiance, and establishes new political relations. But "the reasons for considering the former political laws as abrogated do not apply to the municipal laws which regulate the private relations of individuals to each other, and their private rights of property. The change of sovereignty does not obliterate the subject matters of property or obligations, nor the parties to the right, duties, or compacts; and in respect to these things there is a permanent necessity for an uninterrupted existence of laws of some kind. Accordingly, it is held that the municipal private code remains in force. Yet, it is not proprio vigore, or by the will of the people of the conquered country, but by the acquiescence of the new sovereignty, which
58 is held to intend the continuance of such laws in the absence of new laws displacing them." (Wheat. International Law by Dana, 4th ed., § 346, note 4.) Further on in the same note, the same author says, "The private laws of the former state subsist unless they are suspended by the occupying power: and for the reason that some laws must exist, to regulate private rights and relations, and the persons and things which are their subjects remain unchanged; therefore the laws are permitted to continue until a change is expressly made."

We think it results from the principles stated above, that if the defeat of the Confederate armies had the same effect on the resisting States as if they had been conquered foreign States, the consequences were:

First. That it broke down and destroyed the attempt to establish a separate Southern Confederacy, and removed all obstacles to the maintenance of the authority of the Government of the United States within those States.

Second. T it clothed the Government of the United States with the power to exert its supremacy and will within constitutional limits,

in the matter of rehabilitating such States; and that in the exercise of this function the conquering power could impose an entirely new
59 municipal government upon the vanquished, or could leave them under their former municipal organization, either with or without modification.

Third. That until a new system was imposed, or the old one modified, the former municipal regulations remained of force, and they were only supplanted to the extent that new laws and new regulations were established.

We have supposed this civil status to have been ours, not for the purpose of conceding its truth. It is alike foreign to our intention and to the wants of the case to discuss that question. The restoration of the States that had been resisting to their places in the Union, renders all discussion of the methods by which it was accomplished an immaterial inquiry. Power imposed the conditions; the vanquished had no option but to accept; they did accept the terms, and the present political status is the accomplished result. Political status is more a fact than a theory, and in our complex system of government it depends on the fact of recognition, rather than the constitutionality of the methods by which it is brought about. It is a purely political question, and can never be carried before a court of oyer and terminer. If we could
60 succeed in declaring unconstitutional and void the steps by which we were recognized as States in the Union, the result would be to declare that Alabama is without civil officers, for all the officers of the State hold their commissions derivatively from the reconstruction measures devised by the Government of the United States.

But the question for our solution is not what the conquering power might or should have done. What did it do?

On the 21st June, 1865, the President of the United States issued his proclamation, appointing Lewis E. Parsons provisional governor of the State of Alabama, and empowered and instructed him to reorganize the *the* civil government of the State, assuming, as a reason for it, that "the rebellion which has been waged by a portion of the people of the United States against the properly constituted authorities of the government thereof, in the most violent and revolting form, but whose organized and armed forces have now been almost entirely overcome, has, in its revolutionary progress, deprived the people of the State of Alabama of all civil government." Broad as this language appears,
61 it was not intended to affirm that the State of Alabama was in a state of anarchy, without any rules of civil conduct. It was not intended to declare that all statutes were repealed, and all offices thereby vacated. The utmost it intended to assert was that the State of Alabama, in its municipal organization, was at the mercy of the conquering Federal Government, and that he, the executive head, had the power to ordain new municipal regulations, and intended to exercise it.

And such was the construction placed upon it by Governor Parsons. In his proclamation, dated July 20, 1865, he made known that he came, not to tear down, but to build up; not to wound, but to heal. He did not declare all statutes abrogated or all offices vacated. He proclaimed no new laws and created no new offices. He made known no new rules for the protection of life, liberty, or property, and introduced no new official machinery for the preservation of these inalienable rights. He proposed to adopt and enforce the laws as he found them, save such as the results of the war had rendered inapplicable, and to retain the machinery which those laws had provided for their enforcement,
62 and while he evidently asserted the right to declare offices vacant, he exercised that right sparingly. He retained in office by

name justices of the peace, constables, members of the commissioner's court (except judges of probate), the county treasurer, tax collectors and assessors, coroners, and municipal office's of incorporated cities and towns, who were in office on 22nd May, 1865, and judges of probate and sheriffs who were in office at that time, were retained in their respective offices until others were appointed.

It is contended, however, that the general administrator and guardian of Mobile County was, under the statute of his creation, an officer; and, inasmuch as he is not named in the proclamation as one of the officers retained, this omission to name him vacated his office.

We might concede that his is a quasi office; but it has none of the attributes of a municipal officer. But suppose we concede it is an office; Governor Parsons, representing the conquering power, did not lay his hand upon it or take any steps to vacate it. We have shown above that conquest does not per se overthrow municipal regulation or civil authority. It only confers the power to do so. This particular office or
63 trust was not interfered with, and therefore it continued; but we think the proclamation proves that Governor Parsons, if the subject occurred to him (of which we have doubts), intended to retain this officer or fide commissary in the place in which he found him. We have shown above that he retained all the minor officers whose services are brought into most frequent requisition. The well being of society imperatively demanded this. Without these, order could not be preserved, marriages solemnized, or estates administered. Other officers of higher grade were of less pressing use. These he expressed a willingness to fill "if the loyal citizens of the State find it necessary to have them appointed." He names these officers: Clerks of the circuit courts, solicitors, judges of the circuit courts, chancellors and judges of the supreme court.

It will be seen that Governor Parsons provided for and mentioned all the officers constituted and required in municipal administration. The most numerous classes, those whose services were and are most frequently required, he retained in office. Those whose offices he concluded might be dispensed with for a time, possibly during his
64 provisional administration, he expressed his readiness to fill "if the loyal citizens of the State [should] find it necessary to have them appointed."

We think Governor Parsons in these named classes intended to embrace all the officers of the State employed in municipal administration, and that he thought he had done so. We think, further, that he intended to sanction as he found them the laws and the agents for administration to the end that all the rights of persons, property, successions, personal relations, and police, as the same are enjoyed under our free constitution, might not be interrupted or impaired; and, finally, we think that when he announced his intention not then to appoint clerks of circuit courts, solicitors, judges of circuits, chancellors, and judges of the supreme court, his conclusion was that he had continued in operation all other official machinery for the complete harmonious administration of municipal government. Under these rules neither the overthrow of the Confederacy, Governor Parsons' accession to power, nor any official action taken by him disturbed the incumbency of the office of general administrator and guardian for Mobile County.

65 If it be contended that all the foregoing was done under the President's proclamation of 1865, and that the State governments thereby sought to be rehabilitated were treated as illegal and overthrown by the Congressional reconstruction of 1867, the answer is, first,

that this did not and could not annul what was done permissively, if you please, in 1865, under the sanction or acquiescence of the provisional governor; second, the reconstruction act itself did not abrogate the State governments or their machinery then in exercise, but only declared that until the people of said rebel States shall be by law admitted to representation in the Congress of the United States any civil government which may exist therein shall be deemed provisional only.

Much contrariety of opinion may be entertained and expressed by publicists as to the regularity of each of the plans of reconstruction through which we have passed. It is neither our purpose or province to enter upon the discussion. It is a political question which cannot come before us. The result of the first temporarily and of the last up to the present time, has been in each case an accomplished fact. We must deal with it as it was and is, not as we may believe it should have been. (See Plowman vs. Thornton, 52 Ala., 559–566.)

66 We find no error in the record, and the judgment of the circuit court is affirmed.

Manning, J., not sitting.

*Judgment in supreme court.*

Supreme court.

THOMAS J. RILEY ET ALS. *vs.* GEORGE W. BUCKLEY. } 1 DIV. 257.

THURSDAY, *May* 2, 1878.

Court met pursuant to adjournment.

Come the parties by their attorneys, and the record and matters therein assigned as error, being argued and submitted on briefs, and duly examined and considered by the court, it is adjudged that in the record and proceedings of said circuit court there is no error. It is thereupon considered that the judgment of said circuit court be in all things affirmed.

It is also considered that the appellants and John Maguire and William H. Ketchum, sureties on supersedeas bond, pay the amount of the judgment of said circuit court, five per cent. damages and interest thereon, and the costs of said appeal in this court and in the court below.

Manning, J., not sitting.

67 And on the 9th day of May, 1878, the following petition for writ of error, *writ of error*, bond, and citation, were filed in the office of the clerk of the supreme court of Alabama, to wit:

*Petition for writ of error.*

To the Hon. Robert C. Brickell, chief justice of the supreme court of the State of Alabama:

The petition of Thomas J. Riley, George A. Ketchum, and Willis G. Clark would respectfully shew unto your honor:

That on the 2nd day of May, A. D. 1878, a final judgment was rendered against your petitioners, and against John Maguire and William H. Ketchum, by the supreme court of the State of Alabama, held at Montgomery, for the sum of thirty-two hundred and ninety-three dol-

name justices of the peace, constables, members of the commissioner's court (except judges of probate), the county treasurer, tax collectors and assessors, coroners, and municipal officers of incorporated cities and towns, who were in office on 22nd May, 1865, and judges of probate and sheriffs who were in office at that time, were retained in their respective offices until others were appointed.

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It will be seen that Governor Parsons provided for and mentioned all the officers constituted and required in municipal administration. The most numerous classes, those whose services were and are most frequently required, he retained in office. Those whose offices he concluded might be dispensed with for a time, possibly during his
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We think Governor Parsons in these named classes intended to embrace all the officers of the State employed in municipal administration, and that he thought he had done so. We think, further, that he intended to sanction as he found them the laws and the agents for administration to the end that all the rights of persons, property, successions, personal relations, and police, as the same are enjoyed under our free constitution, might not be interrupted or impaired; and, finally, we think that when he announced his intention not then to appoint clerks of circuit courts, solicitors, judges of circuits, chancellors, and judges of the supreme court, his conclusion was that he had continued in operation all other official machinery for the complete harmonious administration of municipal government. Under these rules neither the overthrow of the Confederacy, Governor Parsons' accession to power, nor any official action taken by him disturbed the incumbency of the office of general administrator and guardian for Mobile County.

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that this did not and could not annul what was done permissively, if you please, in 1865, under the sanction or acquiescence of the provisional governor; second, the reconstruction act itself did not abrogate the State governments or their machinery then in exercise, but only declared that until the people of said rebel States shall be by law admitted to representation in the Congress of the United States any civil government which may exist therein shall be deemed provisional only.

Much contrariety of opinion may be entertained and expressed by publicists as to the regularity of each of the plans of reconstruction through which we have passed. It is neither our purpose or province to enter upon the discussion. It is a political question which cannot come before us. The result of the first temporarily and of the last up to the present time, has been in each case an accomplished fact. We must deal with it as it was and is, not as we may believe it should have been. (See Plowman vs. Thornton, 52 Ala., 559–566.)

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*Judgment in supreme court.*

Supreme court.

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THURSDAY, *May* 2, 1878.

Court met pursuant to adjournment.

Come the parties by their attorneys, and the record and matters therein assigned as error, being argued and submitted on briefs, and duly examined and considered by the court, it is adjudged that in the record and proceedings of said circuit court there is no error. It is thereupon considered that the judgment of said circuit court be in all things affirmed.

It is also considered that the appellants and John Maguire and William H. Ketchum, sureties on supersedeas bond, pay the amount of the judgment of said circuit court, five per cent. damages and interest thereon, and the costs of said appeal in this court and in the court below.

Manning, J., not sitting.

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*Petition for writ of error.*

To the Hon. Robert C. Brickell, chief justice of the supreme court of the State of Alabama:

The petition of Thomas J. Riley, George A. Ketchum, and Willis G. Clark would respectfully shew unto your honor:

That on the 2nd day of May, A. D. 1878, a final judgment was rendered against your petitioners, and against John Maguire and William H. Ketchum, by the supreme court of the State of Alabama, held at Montgomery, for the sum of thirty-two hundred and ninety-three dol-

lars, with interest thereon from the 16th day of June, A. D. 1876, together with five per cent. damages on the amount of said judgment:

That on the determination of said cause, and in the rendering of the judgment by said supreme court, was brought in question the validity and legal effect of the proclamation of Andrew Johnson, President of the United States, issued on the 21st day of June, A. D. 1865, declaring that there was no civil government in the State of Alabama, and
68 appointing Lewis E. Parsons provisional governor of said State, and also was drawn in question the validity and legal effect of the proclamation of said Lewis E. Parsons, provisional governor acting under the authority of the proclamation of President Johnson as aforesaid, issued and dated on the 20th July, 1865, for the purpose of organizing civil government in the State of Alabama, and also was drawn in question the validity and legal effect of the general military order, being numbered one hundred, issued by the War Department, and approved by Abraham Lincoln, President of the United States, for the instructions to the officers and armies in the State of Alabama.

And your petitioners are advised and believe, and therefore state, that in rendering the judgment by said supreme court the validity and the legal effect of both the proclamation of Andrew Johnson, President of the United States, and the proclamation of Lewis E. Parsons, provisional governor of Alabama, as well as the general military order aforesaid, approved by Abraham Lincoln, President as aforesaid, on the 24th April, A. D. 1865, were drawn in question, as will appear from the pleadings in the cause and the judgment and decision of the su-
69 preme court of the State of Alabama, was opposed alike to the legal validity and to the legal effect of both of said proclamations, and also opposed to the validity and the legal effect of said general military order, numbered one hundred, before described.

Your petitioners further state that each of said proclamations and said general military order were issued and made under the authority of the Government of the United States of America, and therefore they are entitled to a writ of error to the Supreme Court of the United States, to be held on the second Monday of October next, A. D. 1878, which they pray your honor to grant.

THOMAS J. RILEY,
GEORGE A. KETCHUM,
WILLIS G. CLARK,
By E. S. DARGAN,
*Their Attorney.*

Granted May 8th, 1878.

ROBERT C. BRICKELL,
*Chief Justice Sup. Ct of Ala.*

Filed in office clerk supreme court of Alabama, May 9th, 1878.
T. J. RUTLEDGE,
*Clerk.*

70 *Writ of error.*

UNITED STATES OF AMERICA:

To the honorable the judges of the supreme court of the State of Alabama:

Because in the record and proceedings, as also in the rendition of judgment in said supreme court of the State of Alabama, before you, or some of you forming said court, it being the highest court of law or equity in said State of Alabama, in which a decision could be had in said suit. In which said suit George A. Ketchum, Willis G. Clark, and Thomas J. Riley, and John Maguire, and William H. Ketchum, were

appellants, and George W. Buckley was appellee, wherein was drawn in question the validity and the legal effect of the proclamations of Andrew Johnson, President of the United States, dated 21st day of June, A. D. 1865, whereby he declared that there was no civil government in the State of Alabama, and by said proclamation appointing Lewis E. Parsons provisional governor, and for other purposes which will appear by reference to said proclamation; and also was drawn in question the validity and legal effect of the proclamation of said Lewis E. Parsons acting under the authority of the
71 proclamation of Andrew Johnson, the President of the United States, which said proclamation of said Lewis E. Parsons, then provisional governor of the State of Alabama, is dated on the 20th day of July, A. D. 1865; and also was drawn in question the validity and legal effect of the instructions and proclamations of President Abraham Lincoln, numbered one hundred, and dated the 24th day of April, A. D. 1863, for the government of the military officers of the United States, and for the United States Army in the State of Alabama. And the decision of the supreme court of the State of Alabama was against the validity and legal effect of the said proclamation of Andrew Johnson, President of the United States, also against the validity and legal effect of the proclamation of Lewis E. Parsons, provisional governor, as aforesaid, organizing civil government in the State of Alabama, and appointing various civil officers and omitting to appoint others to fill offices that had become vacant by the overthrow of civil government in Alabama; and also against the validity and the legal effect of the instructions and proclamation of Abraham Lincoln, then President of the United States, numbered one hundred, dated 24 day of April,
72 1863, and against the defenses set up by said appellants under each and all of said proclamations as will fully appear by the pleas of said George A. Ketchum, Willis G. Clark, and Thomas J. Riley, set up and pleaded in bar of the demand asserted by said George W. Buckley, and therefore a manifest error has happened, to the great damage of said George A. Ketchum, Willis G. Clark, and Thomas J. Riley, as by their complaint appears; and now, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal you distinctly and openly send all the proceedings and the record thereof to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at our Supreme Court, to be held at Washington, on the second Monday of October next, in the year of our Lord one thousand eight hundred and seventy-eight, in order that the record and proceedings being inspected, our said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

73 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 4th Monday of December, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued the 8th day of May, A. D. 1878.

[UNITED STATES CIRCUIT COURT,
SOUTHERN DIS. OF ALA.] N. W. TRIMBLE,
*Clerk of the Circuit Court of the United States,*
*Southern District of Alabama.*

Filed in office of clerk supreme court of Alabama, May 9th, 1878.
T. J. RUTLEDGE, *Clerk.*

*Bond.*

THE STATE OF ALABAMA:

Know all men by these presents that we, George A. Ketchum, Thomas J. Riley, and Willis G. Clark as principals, and John Maguire, Peter Burke, and William H. Ketchum, as sureties, are held and firmly bound unto George W. Buckley in the sum of seven thousand dollars, to the payment of which we bind ourselves jointly, severally, and firmly by these presents. Witness our hands and seals this the 8th day of May, A. D. 1878.

71 The condition of the above and foregoing bond is this: Whereas George W. Buckley did, on the second day of May, A. D. 1878, recover a judgment in the supreme court of the State of Alabama, against Geo. A. Ketchum, Thomas J. Riley, and Willis G. Clark, the above bounden, of the State of Alabama, county of Mobile, for the sum of thirty-two hundred and ninety-three dollars, with interest on said sum from the 16th day of June, 1876, together with five per cent. damages on said sum of thirty-two hundred and ninety-three dollars, it being the amount of a judgment recovered by said George W. Buckley on the 16th day of June, A. D. 1876, against the said George A. Ketchum, Thomas J. Riley, and Willis G. Clark, in the circuit court of Mobile County, in the State of Alabama, for the said sum of thirty-two hundred and ninety-three dollars, from which judgment the said Ketchum, Riley, and Clark took an appeal to the supreme court of Alabama, and gave as the securities on their appeal bond John Maguire and William H. Ketchum.

And said judgment being affirmed by the said supreme court of the State of Alabama, the said George A. Ketchum, Thomas J. Riley,

75 and Willis G. Clark, have prayed for and obtained a writ of error to the Supreme Court of the United States, which was filed within ten days from the rendition of said judgment for the purpose of superseding the same, and preventing a writ of execution thereon; and notice of the said appeal being given to the said George W. Buckley:

Now if the said George A. Ketchum, Thomas J. Riley, and Willis G. Clark shall prosecute their said writ of error to effect and pay all damages and costs as well as the judgment that may be rendered if they fail to make their plea, by writ of error, good, then this bond to be void, otherwise to be and remain in full force and effect.

THOS. J. RILEY. [SEAL.]
W. G. CLARK. [SEAL.]
JNO. MAGUIRE. [SEAL.]
P. BURKE. [SEAL.]

Witness:
E. S. DARGAN.

GEO. A. KETCHUM. [SEAL.]

Witness:
WILLIS ROBERTS.

WM. H. KETCHUM. [SEAL.]

Witness:
WILLIS ROBERTS.

Approved May 8th, 1878.

ROBT. C. BRICKELL,
*Chief Justice Sup. Ct of Ala.*

76 Filed in office clerk supreme court of Alabama, May 9th, 1878.
T. J. RUTLEDGE, *Clerk.*

*Citation in appeal.*

The United States of America to George W. Buckley, or Gibbons & Price, his attorneys of record:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, wherein George A. Ketchum, Thomas J. Riley, Willis G. Clark, John MaGuire, and William H. Ketchum are plaintiffs in error, and you, George W. Buckley, are defendant in error, to show cause, if any there be, why the judgment rendered by the supreme court of the State of Alabama, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Robert C. Brickell, chief justice of the
77 supreme court of the State of Alabama, this the 9th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

ROBERT C. BRICKELL,
*Chief Justice Sup. Ct. of Alabama.*

Filed in office of clerk supreme court of Alabama, May 9th, 1878.
T. J. RUTLEDGE, *Clerk.*

*Sheriff's return.*

Received June 6th, 1878, and on the same day I served a copy of the within citation on Lyman Gibbons, one of the firm of Gibbons & Price.

JAMES A. SHELTON,
*Sh'ff M. C.,*
By A. J. LOTT, *D. S.*

THE STATE OF ALABAMA,
*Mobile County:*

Personally appeared before me, Price Williams, judge of the probate court of Mobile County, Andrew J. Lott, who being by me first sworn, on oath says that he served the foregoing notice on Gibbons & Price, attorneys of record for George W. Buckley, in the suit described in said
notice on the 6th day of June, A. D. 1878, by delivering to them
78 a correct copy of this notice, which is written on this half sheet of paper.

This the 13th day of June, A. D. 1878.

ANDREW J. LOTT.

STATE OF ALABAMA,
*Mobile County:*

I, Price Williams, jr., judge of the probate court of Mobile County, in the State of Alabama, do hereby certify that Andrew J. Lott, who is known to me, appeared personally before me, at my office, in the city of Mobile, on this the 13th day of June, A. D. 1878, and under oath, by me administered, made the above and foregoing affidavit to which this certificate is attached, and subscribed his name thereto.

In testimony whereof I have hereto set my hand and affixed the seal

of said court, at office in the city of Mobile, on this the 13th day of June, A. D. 1878.

[PROBATE COURT, MOBILE COUNTY, ALA.] PRICE WILLIAMS, JR., *Judge.*

79 STATE OF ALABAMA,
*Office Clerk Supreme Court.*

I, T. J. Rutledge, clerk of the supreme court of the State of Alabama, hereby certify that the foregoing pages numbered from one to seventy-eight, both inclusive, contain a full, true, complete, and correct transcript of the record and proceedings had in said supreme court in a certain cause lately pending therein, wherein Thomas J. Riley et als. were appellants, and George W. Buckley was appellee, as the same appear of record and on file in my office as such clerk.

I further certify that the original writ of error and citation filed in said cause are hereto attached as a part of this transcript.

Witness my hand and the seal of said supreme court at the city of Montgomery, Alabama, this the 25th day of June, A. D. 1878.

[SEAL.] T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

80 Supreme Court of the United States.

And now, on this the day of , 1878, come the plaintiffs in error, George A. Ketchum, Thomas I. Riley, Willis G. Clarke, William H. Ketchum, and John McGuire, who complain and say that there is error in the record and judgment in this case, of which the foregoing is a complete transcript, and the plaintiffs in error assign the following errors:

The supreme court of Alabama erred—

First. In affirming the judgment of the circuit court of Mobile County sustaining the demurrer to 2nd special plea pleaded by the securities of McGuire.

2nd. The supreme court of Alabama also erred in affirming the judgment of the circuit court of Mobile County sustaining the plaintiff's demurrer to the 3rd and fourth special pleas pleaded by the securities of McGuire.

3rd. The supreme court of Alabama erred in affirming the judgment of the circuit court of Mobile County sustaining the demurrer of the plaintiff to the rejoinder of the securities of McGuire, filed to plaintiff's replication to the 5th special plea of the said securities of Mc-

81 Guire; which said 5th special plea is one of those called in the record "additional pleas" filed by leave of the court.

For these and other errors contained in the record and judgment of the supreme court of the State of Alabama these plaintiffs in error pray this court to annul and reverse the judgment of the supreme court of the State rendered in this cause.

E. S. DARGAN,
*Att'y for Pl'ffs in Error.*

(Indorsement on cover:) No. 766. George A. Ketchum, Willis G. Clarke, and Thomas I. Riley, pl'ffs in error, vs. George W. Buckley. Alabama sup. court. Filed 11th Sept., 1878.

# Supreme Court of the United States.

GEORGE A. KETCHUM, et al.
*vs.*
GEORGE W. BUCKLEY.

No. 766.

WRIT OF ERROR TO SUPREME COURT OF THE UNITED STATES.

## BRIEF OF THOS. H. PRICE,

FOR DEFENDANT IN ERROR,

ON MOTION TO DISMISS, AND TO AFFIRM.

# Supreme Court of the United States.

GEORGE A. KETCHUM, et al.
*vs.*
GEORGE W. BUCKLEY.

No. 766.

WRIT OF ERROR TO SUPREME COURT OF ALABAMA.

BRIEF OF THOS. H. PRICE FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS, AND TO AFFIRM.

In Caperton vs. Bowzer, 4 Wall., 231, Mr. Justice Clifford, in delivering the opinion of the Court, said: "Special jurisdiction only is given to this Court by virtue of a writ of error to a State Court, and unless the record shows that the case falls within the conditions annexed to the right of a party to invoke the exercise of the jurisdiction, the writ of error must be dismissed.

"Primarily, these conditions are two: (1.) That it shall appear that some one of the questions specified in the twenty-fifth section of the Judiciary Act, or the second section of the Amendatory Act, did arise in the case. (2.) That the question which did so arise in the case was decided by the Court in the way therein required to give this Court jurisdiction to re-examine the question, and the rule is settled that unless both those things appear the jurisdiction does not attach."

The record in this case presents no federal question for the decision of the Court below, or of this Court. The case was decided in the Court below on points based upon the acts of State officers under authority of State statutes, the validity of neither of which is drawn in question on the ground of their *repugnance* to the Constitution, treaties or laws of the United States, nor is there any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of, or any commission held, or authority exercised under the United States, nor is there any decision against any such title, right, privilege, or immunity *specially set up or claimed under* such Constitution, treaty, statute, commission, or authority. The only questions presented in the record, were decided by the State Courts "exclusively upon the principles of the jurisprudence of the State."

Marqueze vs. Bloom, 16 Wall. 351.

The case made by the record is this: In the year 1864, in accordance with a special Statute of the State of Alabama, entitled "an Act authorizing the appointment of a General Administrator and General Guardian for Mobile County, and for other purposes," approved December 14th, 1859, one W. W. McGuire was duly appointed to fill said office, and afterwards, in accordance with said Act, to-wit: on the 7th day of March, 1864, made and delivered to the Probate Judge of said County, an official bond in the penal sum of $150,000 with plaintiff's in error, among others, as his securities thereon, and it is alleged, that while holding said office under said bond, to wit: on the 21st day of Sept., 1865, letters of administration were duly granted to him upon the estate of one Wm. W. Buckley, dec'd, by the Probate Court of Mobile County, by virtue of which authority and which acting as such General Administrator, he took and administered upon said estate, which amounted to about the sum of $30,000. And about the month of May, 1869, in answer

to a citation served upon him at the instance of the defendant in error, and the other heirs of said Wm. W. Buckley, dec'd, the said McGuire made his final settlement of his administration of said estate, and decrees were entered in favor of said heirs for the sums due each respectively, upon which executions were issued against said McGuire, and upon the return of "no property found," the defendant in error, as did each of the other heirs, brought suit on said bond for the sums appearing due by said decree, (this, by agreement, being a test case by which all the others are to abide) as for a *devastavit* and waste by the said McGuire.

It is not pretended either in the pleadings, or in the argument, that the Act of Dec. 14th, '59, or the appointment made under it is invalid because repugnant to the Constitution, laws or authority of the United States; nor is it claimed that any act done by any State officer, under any authority of the State of Alabama, is repugnant to the Constitution, treaties or laws of the United States, nor can it be claimed that any such acts were inimical to any title, right, privilege, or immunity *specially set up or claimed* under the Constitution, treaty, statute, commission or authority of the United States, unless the absurd proposition be insisted upon, that as a result of the late war between the States, the autonomy of the government of the seceding States was utterly destroyed, and that all of their laws, courts, and offices were totally abolished, thus converting a war for the preservation of the Union of States, into a war for their utter destruction.

It is claimed, that the office of General Administrator held by McGuire was abolished before the estate came into his hands under the letters which were issued in Sept. '65, and that office being abolished by the Federal war power, these securities were thereby relieved from liability on their bond, and thus they claim "immunity" from the obligation

of their bond, through the acts of the Federal authorities, and the decision of the State Court is against that immunity. This ground of jurisdiction, slim as it certainly is, seems to be the only one relied on in the pleadings, and rests solely on the idea, that the war power of the United States Government totally destroyed and abolished the State Government and State laws and offices, and *all* things done thereby and thereunder without exception.

The contrary of this proposition is well settled.

"The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

So says the Chief Justice in

Texas vs. White et. al., 7 Wall., 700.

And to same effect is

Horn vs. Lockhart, 17 Wall., 570.
Sprott vs. United States, 20 Wall., 459, and
Williams vs. Bruffy, 96 U. S., 176.

The expediency of the reconstruction acts of Congress, or the proclamation of the President of the United States looking to reconstruction were never judicial questions, and their legality is in no way questioned or denied in this record.

Plowman vs. Thornton, 52 Ala., 526.
See opinion in case at bar.

But no such immunity is "specially set up or claimed" as is required by § 709 of the Revised Statutes.

The 2d, 3d and 4th pleas in chief, all allege the destruction of the State government, laws and offices by the results of the war—the third plea alleges that Lewis E. Parsons was appointed by the President, provisional Governor of the State of Alabama, and as such provisional Governor, did "by his proclamation determine what laws should be in force, and did also appoint *numerous* persons to *various* offices," &c; but does not allege that any other person was ap-

pointed to fill the office of General Administrator in McGuire's place, or that McGuire was removed from office, or that any law was declared not in force; but alleges, "that after the office of said McGuire, held by him under his appointment in 1864, had *by virtue of the premises* determined, letters of administration were issued to him on the estate of said Buckley by one George W. Bond, who at that time, claimed to be Probate Judge of Mobile County, by virtue of an appointment to said office by said Parsons, &c." Now in reference to this plea, it will be observed—

1st. That Parsons, by whatever power appointed, was a *State* officer, and whether *de jure* or *de facto*, questions arising out of his acts, as such officer, are State questions only. 2d. The decision in this case so far as it may relate to the acts of Mr. Parsons or his appointees, is not against their validity. 3d. It is not alleged that McGuire was ever removed from his office except by the results of the war—so that, there is nothing contained in this, or any of the other pleas following it, which was not decided exclusively upon the principles of the ordinary jurisprudence of the State without impugning Federal authority of any kind.

McBride vs. Hoey, 11 Pet., 167.
Mich. Central vs. Mich. South. Railroads., 19 How., 378.
Worthy vs. The Com., 9 Wall., 611.
Bethell vs. Demoret, 10 Wall., 537.
Caperton vs. Bowzer, 14 Wall. 216.

There is no matter set up in the "additional" pleas which raises a question of Federal jurisdiction. The removal from office by a State Convention is strictly a matter of State law, within the exclusive jurisdiction of the State Courts.

In short, this writ was evidently taken for delay only, and if there be a shadow of jurisdiction, the question on which it depends is so frivolous as not to need further ar-

gument, and therefore under the 6th rule of the Supreme Court of the U. S. and amendment thereto, this motion to dismiss, and affirm, is made.

THOS. H. PRICE,
for Defendant in Error.

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# Supreme Court of the United States.

GEO. A. KETCHUM et al.
*vs.*
GEORGE W. BUCKLEY.

Motion to Dismiss, and to Affirm.

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And now comes the said defendants in error by his attorney, and moves the Court to dismiss the said cause, and the said writ of error for want of jurisdiction in this Honorable Court to hear the same, for that the record therein contains no question whereof this Honorable Court has jurisdiction by law to hear, review or determine on writ of error.

And the said defendant in error also further moves the Court to affirm the judgment of the said Supreme Court of the State of Alabama in said cause, on the ground that although the record may show that this Honorable Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and for that the question, if any, on which the jurisdiction depends is so frivolous as not to need further argument.

THOS. H. PRICE,
At'ty for Defendant in Error.

For the Court.

# SUPREME COURT OF THE UNITED STATES.

GEORGE A. KETCHUM, THOMAS J. RILEY, WILLIS G. CLARK, et al., Plaintiffs in Error,

VS.

GEORGE W. BUCKLY, Defendant in Error.

## ARGUMENT OF E. S. DARGAN,

FOR PLAINTIFFS IN ERROR.

# SUPREME COURT OF THE UNITED STATES.

GEORGE A. KETCHUM,
THOMAS J. RILEY,
WILLIS G. CLARK, et al,
Plaintiffs in Error,
*vs.*
GEORGE W. BUCKLY,
Defendant in Error.

## ARGUMENT OF E. S. DARGAN, FOR PLAINTIFFS IN ERROR.

The Court will better understand the legal effect of the special pleas to which the defendant in error demurred and his demurrer sustained, by stating the facts upon which their pleas rest for their legal sufficiency:

The office of General Administrator and General Guardian of Mobile County was created by the Act of the General Assembly of the State of Alabama, approved the 14th of December, 1859, (see pamphlet acts of 1859-60, page 551.) Under that act, and in conformity with its provisions, Wesley W. McGuire was appointed such General Administrator and Guardian, and George A. Ketchum, Thos. J. Riley and Willis G. Clark were, with others, his securities, and, on the 4th day of March, 1864, said McGuire and said securities executed the bonds sued on. The term of his office was four years, under the statute aforesaid.

At the time of the appointment of McGuire and the execution of the bond, the State of Alabama was

one of the so-called Confederate States, and was at open war with the United States, denying all its laws and jurisdiction. But before the 20th of June, 1865, the Confederate Government was subdued and abolished and the hostile Government of the State of Alabama was subdued and overthrown, and the entire State and the people thereof were under martial laws and without civil government. See the proclamation of Andrew Johnson, President of the United States, dated 21st of June, 1865, by which he declared that the State of Alabama was without civil government, and appointing Lewis E. Parsons Governor, and authorizing him to organize civil Government in the State. This proclamation is printed in the Revised Code of Alabama of 1867, pages 72 and 73.

In pursuance of the President's proclamation and by virtue of its authority, Lewis E. Parsons called a convention of the people to be elected as prescribed by said proclamation to meet at Montgomery to inaugurate civil government in the State, and he provided that certain civil officers should continue to act as such upon the terms specified, except the Judges of the Probate Court. These he would afterwards appoint upon application of the people of the respective counties. But in the meantime, until such appointments should be made, he authorized the Probate Judges to continue to discharge the duties of their offices upon their taking the oath of fidelity to the United States, and giving satisfactory bond and security. George W. Bond had been elected Probate Judge of Mobile County in May, 1861, for the term of six years, and was in office up to the overthrow of the Confederate States and the hostile State Government of Alabama,

but was not re-appointed by Parsons nor did he take the oath prescribed by the proclamation of Parsons. Whether he ever done, or attempted to do, any act as Probate Judge of Mobile County, save only to issue the letters of administration on the estate of Buckly does not appear.

Buckly, the intestate, died in September, 1865, and letters of administration on his estate were issued to McGuire on the 21st of September, 1865. These letters were issued simply to Wesley W. McGuire, but they do not appear to be issued to him on their face in any official capacity.

All the officers appointed by Governor Parsons were to hold their offices during his Provisional Government, then to cease. (See his proclamation.)

The office of Administrator and General Guardian of Mobile County is not mentioned in the proclamation of Parsons.

But it is important to notice that the terms of all civil officers appointed by Governor Parsons were to hold their offices during his Provisional Government and not longer.

The foregoing facts are all I deem necessary to state to enable the Court to comprehend the legal effect of the special pleas numbered two, three and four, as well as the two special pleas, named or called in the record additional pleas, filed by the leave of the Court, and from these facts the first question arises isthis :

What is the legal status of a people whose Government has been overcome in war, their armies annihilated and all resistance to the conquering power abandoned and martial law pervading their entire territory ? Such was the condition of the people of Ala-

bama at the time President Johnson issued his proclamation of the 21st of June, 1865, declaring that the people of Alabama had no civil Government.

The best answer to this question I can give is given in the case of Hall vs. Campbell, 1 Cowper's Reports, page 204.

This case was argued four times and Chief-Justice Mansfred delivered the unanimous opinion of the Court, and from this opinion I can safely say, the people stand at the mercy of their conqueror. He can prescribe laws for the conquered at his own will without legislation; he can appoint officers to rule over them; he may permit their laws to stand, or he may, by his own will or declaration, abolish all of them, or some of them, and let others remain in force. This Parsons did by his proclamation. He abolished all laws respecting slavery, and all laws enacted subsequent to the 11th of January, A D. 1861, the date of secession of the State of Alabama. Those not abolished by him remained. But there was no officer to execute the laws. So he had to appoint officers and clothe them with authority to administer the laws according to their respective offices, and for the term by him prescribed, which was during his Provisional Government. Now suppose he had filled no civil office there could have been no administration of civil law, although all civil laws not abrogated by Parsons would have remained. But how could they have been enforced or administered? The Government of the State of Alabama that had appointed its officers was annihilated. Parsons alone was Governor with power to fill all civil offices. All that he filled were clothed with legal power to administer the laws; those not filled by him

were vacant. The case referred to (Hall vs. Campbell, 1 Cowper,) fully sustains the view I have presented, and that case has never been overruled. (See also the case of Jeffrees vs. the State, 39 Ala., 655.) It has been approved of by Chancellor Walworth in 17 Wendell, at page 587, and the principles announced by it have been recognized by this Court in the case of the Mechanics' Bank vs. the Union Bank, (22 Wallace, page 276.) The facts were as follows: After General Butler occupied New Orleans and took possession with his army, he appointed a Provost Judge of the City of New Orleans, and this Judge took jurisdiction of a civil suit, and rendered judgment in favor of the plaintiff for $150,000 against the defendant. The legality of this judgment was brought before this court, and its legality approved. (22 Wallace R., at page 295.)

Now let me put the question in this manner: If the officers of the State Government of Louisiana yet retained their offices, and by virtue of their State appointment could administer the laws of the State in New Orleans, how could General Butler legally establish a Provost Court to decide civil causes? Suppose there had been a conflict of opinion between the Provost Judge and the State Judge, whose opinion would prevail? Who would reconcile them?

This decision on principle is in accordance with the decision in first Cowper referred to, and it only affirms the doctrine of this Court announced in the case of the Grape Shot cited by Justice Miller in delivering the opinion of the Court.

Now permit me to ask why is it lawful for the Commander-in-Chief to appoint a Judge, *or Judges*, to ad-

minister civil rights between individuals in a conquered country? The answer is: Because the conquered Government being abolished or annihilated there is no one in office authorized to administer the laws, although the conquerer does not abolish or alter the laws themselves, they remain as before until the Commander alters them. But the officers who derived their official authority from the defunct Government officially die with the Government from which they derive their authority, for if they survive the overthrow or destruction of the Government from which they derived their authority the conflict between them and those appointed by the conquering power would be such that no system of Government, neither civil or military, could tolerate.

Governor Parsons took the correct view of the matter in his proclamation. He removed no one from office, but treated all civil offices vacant resulting from the destruction of the rebel State Government, but he filled such as he thought proper, and *prescribed* the terms and conditions with which his appointees should comply before they entered upon the discharge of their duties.

He had the power, and therefore the right, to fill all civil offices; he could fill all or a part of them as he saw fit. The office of Probate Judge he expressly refused to fill, but promised so to do when proper persons were recommended to him.

The office of General Administrator and Guardian of Mobile County was not mentioned in his proclamation. It therefore stood after the proclamation as it stood before it, after the complete subjugation and overthrow of the rebel State Government of Alabama. The

offices existed for the law creating it was not annulled by the proclamation but there was no incumbent in office; it was vacant and his proclamation shows that he did not intend to fill all the offices, but only such as he then deemed necessary. His failure to fill an office cannot be construed into a grant of authority to the person who did fill it under the defunct Government to continue to perform the duties of such office.

The Supreme Court of Alabama seemed to think that as Parsons had, not to use their language, laid his hands on the office of General Administrator, it must therefore be implied that the *in*cumbent might continue to perform the duties of the office under his authority. But such a construction of the proclamation is so erroneous that it is only necessary to ask the Court to read the proclamation of Parsons, and the error of such a construction will be apparent.

Still, however, another conclusive answer may be given. The special pleas relied on were pleaded by the secureties of McGuire, not by McGuire himself. The term of the office of McGuire for which his secureties bound themselves was four years. See the act of the Legislature of Alabama before referred to. As soon as this term expired, whether by the expiration of the four years or by resignation, or indeed by any other mode, the liability of the secureties terminated with the term itself; that is, after the expiration of the term for which they bound themselves, they could not by their contract be bound for the administration of any estate upon which letters of administration were issued to McGuire after his term of office for which they bound themselves had terminated, whether from

time or any other cause, for securities are bound only by the terms of their contract, and are not liable for any act of their principals, unless such act is embraced within the terms of their undertaking. See 15 Peters, The United States vs. Boyd, page 206; 5th Peters, 373-385; 5th Ala. Rep., page 383. Whether, therefore, McGuire had been expressly continued in office, or even if his authority to continue might be enforced, he could only continue in office during the Provisional Government of Parsons. See his proclamation, pages 75 and 76. He appointed no one for any longer time. Now, did these secureties bind themselves for *a term during* the Provisional Government of Mr. Parsons? To hold them bound for such a term is not expressed in their contract, nor was it contemplated by the securities; therefore they can well say we have never entered into this covenant.

I therefore submit that the office of General Administrator of Mobile County was vacant when the letters of administration were issued to McGuire on the 21st of September, 1865, or if not vacant but impliedly filled by Parsons' authority it was for a new term, that is, during his Provisional Government, and in either event these securities are not liable for the administration of the Buckley estate.

It was, however, argued in the State Court that the General Administrator and Guardian was not an officer, and, in fact, held no office, but was rather a Trustee. Our own Supreme Court did not sanction this rule contended for by the counsel of plaintiff, below defendant in error in this Court, but went on to affirm the judgment "even if it was an office created by the laws of Alabama." But I think it too clear to admit of con-

troversy that the General Administrator of Mobile is an officer, and as such holds an office created by the State. The act of the 24th of December, 1859, not only calls it an office in express language, but contains conclusive evidence in itself that it is an office and the occupant, or incumbent, an officer.

It is certain that the mere holding of the office is not a trust. Suppose no letters of administration were ever granted to the administrator, and no estate had ever come to his hands, could he, with any propriety, be said to be a trustee for any one? Of what property or interest, or of what duty could he be a trustee, unless letters of guardianship of some minor, or letters of administration of some estate, had been issued to him? In fact, the mere holding the office creates no trust. He, the incumbent, appointed according to law, only holds an office that will entitle him to become a trustee when letters of administration are issued to him, or some estate or letters of guardianship is granted to him of the person and estate of some minor. In either event the bond required of him by law becomes the security for the faithful performance of his duties in reference to such estate thus committed to his charge. In regard to the estates on which letters of administration are issued to him by the Probate Court, he stands as any other administrator would. But without letters of guardianship of some minor, or letters of administration on some estate, there can be no breach of the condition of his bond, nor any trust created. Hence the position of the General Administrator must be an officer, which office gives him the right to administer on particular estates. In the case of Becket vs. Sclover, 7 California Rep., page 215, the Supreme

Court of that State under their statute, in substance like ours, held that the General Administrator was an officer and that he held an office. In the case of Miller vs. the Receiver of the Franklin Bank, 1st page Rep. 444, Chancellor Walworth decided that the General Administrator of the City of New York was an officer under the *law* of New York.

But as our own Supreme Court in substance admitted that the General Administrator of Mobile County was an officer, and as the act of our Legislature in words makes it an office, it may be unnecessary for me to submit any a gument to prove it.

Now as the letters of administration to McGuire were issued on the 21st of September, 1865, after both the proclamations—first, the proclamation of President Johnson; second, the proclamation of Parsons—McGuire could not have been Administrator-General under his old term to which he was appointed during the rebellion in March, 1864, and even if he continued in office under the authority of Parsons (but I think it clear he did not,) it must have been under a new authority and for a different term than the one for which his securities bound themselves, and therefore they are not bound for the administration of Buckly's estate.

The Supreme Court of Alabama omitted entirely to notice the fifth special plea called in the Record additional pleas filed by leave of the Court. Why, I am not able to tell, but it does appear to me that the argument or reasons assigned by our Supreme Court for their judgment in affirming the judgment of our Circuit Court would have led to a reversal and not the affirmance of the judgment of the Court below.

The said fifth plea in substance affirms that George

W. Bond had not been appointed Judge of the Probate Court of Mobile County, neither by Lewis E. Parsons, Governor of the State, nor by any other legal authority. To this plea the plaintiffs below, defendants in error, replied that George W. Bond had been elected Judge of the Probate Court by the people of Mobile County on the 6th day of May, 1861, and on the 11th day of May, 1861, gave bond and security and entered upon the duties of his office, the term of which was for six years, and was in office and acting as Judge of the Probate Court on the 11th of September, 1861, when said letters of administration were issued to said McGuire. The plaintiffs in error, the secureties of McGuire, rejoined in substance that the State Government of Alabama was overthrown and extinguished before the first day of July, 1865, and all offices thereby vacated, and that said Bond was not afterwards appointed Judge of the Probate Court neither by Parsons, the Provisional Governor, nor by any legal authority, until July, 1866, and the letters of administration having been issued to McGuire on the 21st of September, 1865, were issued illegally and without competent authority. These defendants, the securities of McGuire, are not liable for his acts as such administrator. To this rejoinder the plaintiffs demurred, and for cause of demurrer said that the matter and things set up in the rejoinder are no answer to the replication, and the Court sustained the demurrer to the rejoinder. It may be proper to remark that our State practice is different from the common law practice of pleading. No demurrer can be allowed but to matter of substance which the party demurring particularly specifies as cause of demurrer. Revised Code

of Alabama of 1867, page 529, section 2,656. As no specific cause of demurrer was assigned no question could be raised as to want of certainty, either in the plea or the rejoinder. But the sole question presented was this: Did the election of Bond in 1861 retain him in office for six years, notwithstanding the overthrow and extinguishment of the Rebel State Government, and notwithstanding the refusal of Parsons to appoint the Probate Judges to fill the offices to which they had been elected during the rebellion. The argument I have before submitted is all I can say to show that the office of Bond as Probate Judge was vacant by the overthrow of the State Government and of all civil Government. It cannot be denied but that the Judge of Probate Court held an office under the State Government before the overthrow of the State Government, yet the plaintiffs below insisted that the election of Bond in 1861 for six years, notwithstanding the results of the war, the destruction of the State Government and the refusal of the conquering power to appoint Bond to the office which he had once filled, retained him in office clothed with all judicial power his election gave him in 1861. If it should be said that Bond might possibly have taken the oath prescribed in the proclamation of Parsons and thereby qualified himself to hold the office and thereby retained his judicial authority, it is only necessary to answer no such cause was assigned in the demurrer, and had it been alleged in the replication issue would have been taken upon it, and this cause would not, in all probability, ever have reached this Court, but instead of so replying or so demurring, the plaintiff placed himself upon the legal authority of Bond by virtue of his election

by the people in 1861. This was the only question raised, argued or determined by the State Court.

Now, I think it clear thar the securities of McGuire are only bound for his acts where letters of administration are legally issued to McGuire. He (McGuire) might be bound, if not otherwise, as *executor de son tort*. But his secureties could only be bound where the estate had legally come to his hands as such administrator, for such must be the legal effect of their *bond*. They cannot be liable when he takes possession of an estate without legal authority.

A motion may be made to dismiss the writ of error for want of jurisdiction, alleging there is no Federal question involved in the cause.

If such motion should be made I would only refer the Court to the 25th section of the Judiciary Act, for all our defenses depend on acts done under the authority of the United States. If these acts done under the authority of the United States create an exemption from liability, or a defense to the action, and the State Court has ruled against such exemption or defense, it is then the duty of this Court to correct such miss-ruling of the State Court.

All of which is respectfully submitted.

E. S. DARGAN,
Attorney for Plaintiff.

# In Supreme Court of the United States.

## NO. 766.

GEORGE A. KETCHUM

*vs.*

GEORGE A. BUCKLEY.

**On motion to dismiss or affirm.**

The motion made in this case has been replied to in the brief filed by Judge Dargan to which we refer.

There is clearly a question raised by the third plea that confers jurisdiction.

This question is not, as is contended, a frivolous one, justifying an affirmance without further argument, for it involves the determination of the power of the Executive to appoint a provisional governor for the State of Alabama, and a careful construction of his proclamation to ascertain its effect in vacating the office of the probate judge of Mobile County.

These are not frivolous questions, and they ought to be determined when the case itself is heard on the merits.

P. PHILLIPS,
*For Plaintiff in Error.*

RILEY & KETHUM,
vs.
BUCKLEY.
} Supreme Court of the United States.

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## Reply of E. S. Dargan to the Brief of Mr. Prees on Motion of the Defendant in Error to Dismiss the Writ of Error.

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The annihilation of the Rebel State Government of Alabama was an act done under the authority of the United States. That act was completed before letters of administration were granted to McGuire. Now, if the act of overthrowing the Rebel Government gives the Plaintiff in Error a defense to the action—and that defense is properly set forth in the pleas demurred to—and the Supreme Court of Alabama sustains the demurrer, their judgment must be subject to revision in this Court.

The case of Capenton vs. Bowyer, 14 Wallace Reports, page 216, limits the jurisdiction of this Court to review and reverse the judgments of State Courts as far as its jurisdiction can or ought to be limited. In that case the plea was so informally drawn that the demurrer to it might have been properly sustained without deciding against the validity of the act of Congress; therefore this Court would not presume that the State Court decided against the validity of said act. But, if there *had* been no ground upon which the demurrer could have been sustained without denying the validity or the applicability of the act, this Court must have been constrained to have taken jurisdiction and decided the cause on its merits. In that case it was said "that this Court would not assume that a

Federal question had been decided unless the record plainly shows that it had been."

But, there the question arises, if the plea in that case had setforth the act of Congress in such form that no other ground of demurrer could be sustained but the insufficiency of the act of Congress to create the bar asserted by the plea would it not then have plainly appeared from the record that the Federal question was raised and decided? If not this Court would have to presume that the State Court placed its decision on a ground not *raised* or mentioned even by the record. The jurisdiction exercised by this Court under the 25th section of the judiciary act is a very important one to the stability of our Government, and, I think, the true theory of such jurisdiction is embodied in the nature of our constitution and the theory of our government, and that the 25th section referred to was intended or originated more to mark out the mode in which it should be exercised and to prescribe the limits of such jurisdiction than as a grant of jurisdiction which this Court could not exercise without the aid of the section referred to. It is not so much a grant of juridiction as it is a limit of jurisdiction and prescribing in what manner and under circumstances the jurisdiction of this Court may be rightly invoked.

We ought not to avoid the exercise of this jurisdiction, *nor* assume it, unless it sufficiently appears that the case calls for its exercise. The validity of an act of the Government must be equally protected by this jurisdiction as an act of Congress. It would be vain to say the State Court did not decide against the validity of the act of the Government, it only denied the legal consequences that flowed from it or that necessarily resulted from it, for such a proposition would be to admit the authority and the validity of the act but deny all its effects, thus rendering the act of the Government vain and nugatory.

I think this Court must hold that the legal effect of the act or the legal effects that necessarily flow from

the act are as much under the jurisdiction of this Court as the act itself. Suppose the State Court should admit the legality of the act but then proceed and deny its legal effect or its necessary results would this Court because of such admission refuse to take jurisdiction; or, suppose the State Court should decide that an act of Congress was valid but still by its judgment deny its legal effect, could such admission deprive this Court of jurisdiction? I think the Court would say, No, we must preserve the act, and this can only be done by enforcing its legal effect.

Now, the act of the Government which we say determined the office of McGuire was the complete overthrow of the Rebel State Government of Alabama which gave the office to McGuire, and this act is evinced by the proclamation of President Johnson, dated....day of....., 1865, also the proclamation of Governor Parsons, dated....day of.....1865, both of which are to be found in the Revised Code of Alabama of 1867, pages..... 74 75, 76

There was then no civil government, no civil officer of the State of Alabama, after the annihilation of the Rebel Government of Alabama until civil government was inaugurated by or through the authority of the President, and this Government was legal though it was provisional.

Now, if the term of the office for which Riley et als was determined before the letters of administration was issued to McGuire, the securities cannot be held liable, for neither the demurrers nor any argument in this case has ever denied that McGuire held an office, as contradistinguished from a trust, nor can it be doubted but that the termination of his term of office before the time expressed in the bond sued on as the term when their liability should cease equally releases the securities for any act done upon lettters of administration issued after termination of term for which they bound themselves. The legal effect then of the act of the Government in overthrowing the Rebel State Govern-